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No. _

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1981

LOIS CHAPMAN,

*Petitioner,*

—vs.—

ANTHONY CARDARELLI, THE HONORABLE WILLIAM PIKE, WILLIAM J. BROWN, ATTORNEY GENERAL OF OHIO,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether a writ of habeas corpus should issue because, in a criminal trial for violation of a municipal ordinance prohibiting the distribution and sale of obscene material, the prosecution's failure to offer expert testimony or other evidence, apart from introduction of the materials themselves, to prove the essential element of the materials' appeal to the prurient interest of the members of the sexually deviant group to which the materials were directed, violated the First and Fourteenth Amendments to the United States Constitution?

2. Whether a writ of habeas corpus should issue because Sections 76.1 and 76.11 of the codified ordinances of the City of Tallmadge, Ohio, which attach criminal penalties for the distribution and sale of obscene materials, are

unconstitutionally vague and overbroad in violation of the First and Fourteenth Amendments to the United States Constitution?

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Respondents

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Lois Chapman, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

## OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Sixth

Circuit is set forth in the Appendix at pp. 42-44. The unreported opinion of the United States District Court for the Northern District of Ohio, Eastern Division is set forth in the Appendix at pp. 46-64. The unreported report of the United States Magistrate is set forth in the Appendix at pp. 65-83. The unreported order of the Ohio Supreme Court is set forth in the Appendix at pp. 84-85. The unreported opinion of the Ohio Court of Appeals, Ninth Appellate District, is set forth in the Appendix at pp. 86-101.

## JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit were filed on March 4, 1982. The Court of Appeals denied the petitioner's application for rehearing on April 16, 1982. This petition seeks review of the judgment of a United States Court of Appeals in a civil case. This

Court has jurisdiction to grant this petition under 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States are set forth in the Appendix at pp. 143-144. Title 28, Section 2241, 2253 and 2254 of the United States Code are set forth in the Appendix at pp. 145-154 Tallmadge City Code of Ordinances Sections 76.1 and 76.11 are set forth in the Appendix at pp. 155-160.

## STATEMENT OF THE CASE

This petition seeks review of the judgment entered by the United States Court of Appeals which affirmed the decision of the United States District Court for the Northern District of Ohio, denying petitioner's petition for a writ of habeas corpus. Petitioner instituted habeas corpus proceedings to challenge her conviction and sentence under the Tallmadge

ordinances prohibiting the dissemination of obscene materials.

On November 30, 1978, petitioner Lois Chapman was convicted of pandering obscenity under Tallmadge City Ordinances §§76.1 and 76.11 in the Municipal Court of Cuyahoga Falls, Ohio. The prosecution introduced four magazines as its sole evidence to obtain a conviction against Mrs. Chapman. The four magazines, "Peek Show" (State Exhibit A), "Wet Dreams" (State Exhibit B), "Smut" (State Exhibit C), and "Hung Cadets" (State Exhibit D), each depicted bizarre and deviant activities, quite obviously focused at sexually deviant groups. "Peek Show" contained explicit photographs of male homosexual activity including masturbation, fellatio, and anal sodomy. The photographs placed an emphasis on the genitals of the completely nude men while they engaged in homosexual activity. "Wet Dreams" was directed to lesbian-scatological interests and enema fetishes.

The magazine was comprised of one picture after another of women urinating--sometimes on one another, and at other times, by themselves, while another woman looked on in obvious voyeuristic interest. Also included in "Wet Dreams" was a series of pictures depicting groups of nude women and occasionally a naked man, administering enemas to one another. Another picture showed a nude woman squirting milk from her breasts on another woman. The third magazine, "Smut," contained a series of photographs depicting bondage and sado-masochistic activities. The magazine, in a two-page spread, included a series of photographs of men's and women's breasts with nipples pierced by hat pins and earrings. In one instance, the nipple was pierced by six or seven earrings. In another photograph, a naked woman was shown hanging by her hands with her wrists bound by leather belts. Attached to the nipples

of her breasts were two vises, tightly closed, from which chains were suspended with weights on the ends. The final piece of evidence introduced by the prosecution in support of its case was a magazine entitled "Hung Cadets." Like "Peek Show," "Hung Cadets" featured male homosexual activity including acts of masturbation, fellatio, and anal sodomy performed by totally nude men upon other nude men. As in all of the magazines, the photographs particularly focused on the models' genital areas.

After presentation of all the evidence and arguments of counsel, the trial judge instructed the jury that it was to determine whether the material was obscene when "judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to such group...." Solely on the basis of the four magazines

described above, the jury returned a conviction against Lois Chapman for pandering obscenity. The petitioner was fined a total of Two Thousand Dollars ($2,000.00) and sentenced, on two counts, to thirty (30) days confinement in county jail, to run concurrently. The sentence was stayed, and petitioner remained free on bond, pending appeal to the Ohio Court of Appeals and the Supreme Court of Ohio.

At trial, petitioner raised timely objections that the ordinances under which she was charged were unconstitutional under the First and Fourteenth Amendments due to overbreadth and vagueness, and that the failure of the prosecution to produce expert testimony regarding the materials depicting deviant sexual behavior constituted a denial of her right to due process.

Petitioner appealed her conviction to the Court of Appeals of Ohio, Ninth Appellate District. She renewed her attack

on the constitutionality of Tallmadge's obscenity ordinances under the First and Fourteenth Amendments and reasserted her claim that she had been denied due process of law by the prosecution's failure to present expert witness testimony concerning the prurient appeal of the allegedly obscene materials to deviant sexual groups. The court of appeals rejected petitioner's claims (App. 86 ). She then appealed to the Ohio Supreme Court where she advanced the same constitutional claims. The Supreme Court of Ohio dismissed the petitioner's appeal for want of substantial constitutional question (App. 84 ). Subsequently, petitioner filed a petition for writ of certiorari in the United States Supreme Court, and the petition was denied (App. 83 ).

On June 12, 1980, petitioner Lois Chapman filed a petition for writ of habeas corpus in the United States District

Court for the Northern District of Ohio, pursuant to 28 U.S.C. §§2241 and 2254, to challenge her conviction and sentence on the basis of the unconstitutionality of the Tallmadge City Ordinances and the denial of due process of law (App. 120 ).

The district court denied habeas relief to petitioner, finding the Tallmadge City Ordinances to be constitutional and the due process requirements to have been met (App. 46 ). The district court adopted the conclusion of the magistrate that "the record does not demonstrate, nor has the petitioner shown, that the materials which were [the] gravamen of petitioner's conviction were intended for such a bizarre deviant group that experience of the trier of fact would be plainly inadequate to judge whether the material appealed to the prurient interest as required by Mishkin v. New York, 383 U.S. 502 (1966)" (App. 56-57 ).

Petitioner then appealed the denial of the writ to the Court of Appeals for the Sixth Circuit. The Court of Appeals explained:

> Because the Tallmadge obscenity ordinances [sic] mirrors almost identically the Ohio state obscenity statute, we have held this case until the constitutionality of that statute could be decided by another panel of this court.

(App. 43 ). The other panel of the court found the Ohio obscenity law constitutional in Turoso v. Cleveland Municipal Court, 674 F.2d 486 (6th Cir. 1982). In accordance with this decision, the court found that the Tallmadge obscenity ordinance was also constitutional. Moreover, the court affirmed the district court's finding that petitioner was not denied due process of law in the court below. A petition for rehearing was denied on April 16, 1982. On May 4, 1982, the Court of Appeals ordered a stay of mandate until final disposition of the case by this Court.

The petitioner now seeks review by this Court of the decision rendered by the Sixth Circuit Court of Appeals.

## REASONS FOR GRANTING THE WRIT

The issues raised by this petition strike at the very heart of the constitutional guarantee to free and untrammeled expression. Petitioner seeks clarification of two issues: Whether expert testimony is necessary to determine if the allegedly obscene material appeals to the prurient interest of a sexually deviant group when the materials introduced into evidence are directed to such deviant group? And, Whether or not the City of Tallmadge, Ohio, makes it a crime, under its obscenity law, to publish literature which is protected by the First Amendment and whether or not the City of Tallmadge has given clear and specific notice of what ideas its citizens may express without fear of

criminal prosecution under that Law? These questions raise important concerns which are in need of clarification and resolution by this Court

## ARGUMENT

### I. AN IMPORTANT QUESTION IS PRESENTED, AS TO WHICH THE LOWER COURTS ARE IN CONFLICT, INVOLVING FIRST AMENDMENT AND DUE PROCESS RIGHTS, CONCERNING THE NEED FOR EXPERT TESTIMONY IN AN OBSCENITY PROSECUTION WHERE THE MATERIALS IN QUESTION ARE DIRECTED TOWARD SEXUALLY DEVIANT GROUPS.

This case raises important First Amendment and due process questions regarding the nature of proof in obscenity prosecutions where the materials at issue depict sexually deviant activities and are directed to sexually deviant groups. This Court has in several cases clarified the need and use of expert or other evidence where the materials at issue were directed to an average adult population. Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973); Kaplan v. California, 413 U.S. 115 (1975); Ginzburg v. United States, 383

U.S. 463 (1966). An important question remains unanswered, however, regarding the need and use of expert or other supporting testimony in obscenity prosecutions where the materials depict sexually deviant activities and are directed at sexually deviant groups. Paris Adult Theatre v. Slaton, 413 U.S. 49, 56, n. 6 (1973); Pinkus v. United States, 436 U.S. 293, 302 (1978).

This Court has stated that one of the basic elements for determining the obscenity vel non of a work is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Roth v. United States, 345 U.S. 476, 489 (1957); Miller v. California, 413 U.S. 15 (1973).

In Mishkin v. New York, 383 U.S. 502, 508 (1966), this Court determined that a work need not appeal to the prurient interest of an average community member,

but rather could be found obscene if it appealed to the prurient interest of an "average member" of a sexually deviant group. Thus, Mishkin resolved the anomaly that the more bizarre and deviant the materials--the less likely they would be found to appeal to the average person's prurient interest and therefore, the less likely they would be found to be obscene. However, Mishkin left unresolved the amount of proof required to show that a work appeals to the prurient interest of a deviant group.[1/]

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1/ This question did not arise in Mishkin because, as the Court summarized the evidence:

"The evidence fully establishes that these books were specifically conceived and marketed for such groups. Appellant instructed his authors and artists to prepare the books expressly to induce their purchase by persons who would probably be sexually stimulated by them. It was for this reason that appellant 'wanted an emphasis on beatings and fetishism and clothing - irregular clothing, and that sort of thing, and again sex scenes between women; always sex scenes had to be very strong.' And to be certain that authors fulfilled his purpose, appellant furnished them with such source materials as Caprio, Variations in Sexual Behavior, and Krafft-Ebing, Psychopathia Sexualis." 383 U.S. at 509-510.

In the case at bar, the prosecution sought criminal convictions for the exhibition and sale of four magazines which it urged were obscene. At trial, the only evidence introduced by the prosecution to prove the element of prurient appeal were copies of the four magazines: State Exhibit A, entitled "Peek Show," was directed to a homosexual audience and consisted solely of photographs focusing on the genitals of totally nude males. The photographs depicted the males, singly and in groups, engaged in masturbation, fellatio, anal sodomy and other homosexual activity. State Exhibit B, entitled "Wet Dreams," focused on lesbian-scatological activity and enema fetishes. The entire magazine consisted of photographs of completely nude females, some of whom were urinating, some of whom were observing, while still others were being urinated upon, and photographs of women and occasionally a naked man,

administering and/or receiving enemas. Every photograph emphasized the bizarre nature of the activity and focused on the genitals of the nude models. State Exhibit C, entitled "Smut," contained depictions of bondage and sado-masochistic activities including two pages of photographs of women's breasts with pins and earrings piercing the nipples. Lastly, State Exhibit D, entitled "Hung Cadets," was devoted exclusively to photographs of nude males in a variety of poses showing masturbation, fellatio, anal sodomy and other homosexual activity. As in all of the other exhibits, the photographs focused on the models' genitals.

No testimony, whatsoever, was introduced on the issue of whether the materials appealed to the prurient interest of a sexually deviant group. Nevertheless, the trial court instructed the jury that it could in fact determine the obscenity or

non-obscenity of the materials with reference to a sexually deviant group.

Although this Court has stated that "[a] juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes..." Hamling v. United States, 418 U.S. 87, 104 (1974),[2/] it has also recognized that in extreme cases such as this where the materials are directed not to an average member of the adult community, but to a sexually deviant group, the experience of the jurors might be inadequate to

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2/ It is important to note that in both Hamling and Pinkus v. United States, 436 U.S. 293 (1973), see 551 F.2d 1155, 1158-1159, n. 7, two decisions which, in part, addressed the jury's capability of determining obscenity, expert testimony was introduced by the prosecution in support of its charge that the material in question appealed to the prurient interst of the deviant group.

judge whether the material appealed to the deviant group in question. Paris Adult Theatre v. Slaton, 413 U.S. 49, 56, n. 6 (1973). For, where the jury might be completely capable of evaluating whether a work appealed to the prurient interest of an average community member, based on his or her typical experience, the average juror does not have sufficient knowledge to assess whether a work is sexually stimulating to an average member of a sexually deviant group. Clearly, a juror can determine that the materials in question are totally disgusting, but the prurient interest prong of the test focuses on the erotic, not the emetic.

In essence, the practice of the court below collapses the Miller test into a two-prong, rather than three-prong

test. By not requiring an expert appraisal on whether a bizarre work, focused at a sexually deviant group, appeals to the prurient interest of that group, the court allows the jury to return a conviction of obscenity on the basis that the work depicts sexual activity, that it lacks literary, artistic, political or scientific value and on the uninformed conjecture that the work appeals to the prurient interest of a group with whom the average juror is presumably not familiar. The first prong of the Miller test, therefore, becomes a nullity.

This distortion of the Miller test permits the prosecution to obtain a conviction without proving an essential element of the crime--namely,

the actual obscenity of the material--and thereby denies petitioner her right to due process as guaranteed by the Fourteenth Amendment. The court in United States v. Klaw, 350 F.2d 155 (2nd Cir. 1965) addressed these due process concerns and stressed the importance of expert evidence in this context. The court explained:

> "Due process of law" would be a meaningless cliche if the nonsensical trash that is the subject of this prosecution were allowed to be the basis of a conviction by judge or jury without any proof demonstrating that it has the proscribed effect on any of our citizenry... Having in mind the alternatives of jail or freedom, courts must be aware of the facts of the "held-not-to-be-obscene" or "approved" cases, and ensure that the proof is sufficient to allow a fact finder to set this case apart from them. Otherwise it would be altogether too easy for any prosecutor

> to stand before a jury, display the exhibits involved, and merely ask in summation: "Would you want your son or daughter to see or read this stuff?" A conviction in every instance would be virtually assured.

Id., at 170.

Since Paris Adult Theatre, lower courts have exhibited confusion about the need for expert testimony when materials which are the subject of the prosecution depict deviant sexual activity. The court in Connecticut v. Magee, 32 Conn. Supp. 639, 353 A. 2d 184 (1975), noted:

> Of course, in an obscenity case involving materials bizarre in content, where the appeal may be directed to the prurient interest of a sexually deviant group, such testimony may be helpful and even necessary.

353 A. 2d at 189. While in contrast, the Court of Appeals for the Fifth Circuit stated:

> We find without merit the argument that despite [the principle of Paris Adult Theatre], expert testimony should have been required

> of the Government in the case sub judice because the materials are of a bizarre nature and involve deviant sexual conduct which is not within the common knowledge or full understanding of the average person, or which would not or could not appeal to the average person.

United States v. Hill, 500 F. 2d 733, 740 (5th Cir. 1974), cert. denied, 420 U.S. 952 (1975)(emphasis added). And on other occasions, courts have simply left it to the trial court without further guidance to decide whether expert testimony should be required on that issue. See United States v. Palladino, 490 F. 2d 499, 503 (1st Cir. 1974), on remand, 413 U.S. 916.[3/]

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[3/] The following courts have voiced approval of the practice of requiring expert testimony when the materials contain sexual activity of a "bizarre nature": United States v. Klaw, 350 F.2d 155, 170 (2nd Cir. 1965); State v. Childs, 447 P.2d 304 (Oregon, 1968)(en banc); Dunn v. Maryland St. Bd. of Censors, 240 Md. 249, 213 A.2d 751 (1965); Wisconsin v. Simpson, 56 Wis. 2d 27, 201 N.W. 2d 558 (1972); Olsen v. Doerfler, 14 Mich. App. 425, 165 N.W. 2d 648 (1968). But see, New York v. G.I. Distributors, 20 N.Y.2d 104, 228 N.E. 2d 787 (1967) (in which the New York court affirmed an obscenity conviction for materials geared to deviant sexual groups without evidence of appeal to the group's prurient interest)(Chief Justice Field, dissenting). See also, William E. Brigman, The Controversial Role of the Expert in Obscenity Litigation, 7 Cap. U.L. Rev. 519 (1978) which notes the need for expert testimony in the area of deviant literature.

Thus, the evidence required to support conviction for dissemination of materials palpably geared to sexually deviant groups varies among courts. In some courtrooms such as that in the case at bar, juries are left to speculate on the basis of their everyday experience whether a film, book or magazine depicting bizarre and deviant activities might appeal to those with aberrant sexual interests. while others, adopting a more sensible approach, require testimony by an individual knowledgeable in the subject to appraise the material's appeal to the relevant deviant group.

It is evident that trial courts are in need of guidance on the matter of when expert testimony is required to prove the obscene nature of a film, book or magazine. To date, the courts have attempted to draw lines with little or no success. This case presents a prime opportunity for this

Court to clarify the need for expert testimony in obscenity prosecutions involving materials depicting sexually deviant activities and to establish guidelines for determining its use in assuring that due process standards are met.

For these reasons, petitioner respectfully requests that this Court grant her petition for a writ of certiorari.

## II. AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER THE CRIMINAL OBSCENITY ORDINANCES OF THE CITY OF TALLMADGE, OHIO, ARE UNCONSTITUTIONAL UNDER THE FIRST AND FOURTEENTH AMENDMENTS BECAUSE OF OVERBREADTH OR VAGUENESS.

### A. The Overbreadth And Vagueness Of The Tallmadge Obscenity Ordinance As Written.

In its landmark decision in Miller v. California, 413 U.S. 15 (1973), this Court defined the limitations imposed by the First and Fourteenth Amendments upon the power of the states to proscribe obscenity. This Court held:

> [W]e confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way and which, taken as a whole, do not have serious literary, artistic, political or scientific value.

Id., at 24 (footnote and citations omitted). It is against these guidelines which the City of Tallmadge ordinances must be measured to evaluate their validity.

As the Sixth Circuit noted in its opinion below, the Tallmadge ordinances are almost identical to the Ohio criminal obscenity statutes, §§2907.31 and 2907.01, Ohio Revised Code.[4/] Tallmadge Ordinance §76.11 makes it a crime to disseminate obscene materials while Tallmadge Ordinance §76.1 defines obscenity. That statutory definition, in relevant part, is as follows:

> Section 76.1--Definitions
>
> As used in sections 76.1 to 76.99 of the Tallmadge City Code of Ordinances:
>
> (A) 'Sexual Conduct' means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration,

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4/ Sections 2907.32 and 2907.01, Ohio Revised Code, are set forth in the appendix at pp. 161-166. Petition for Writs of Certiorari attacking the constitutionality of the Ohio obscenity statutes are presently pending before this Court in Sovereign News Co. v. Falke, Docket No. 81-2326 and Turoso v. The Cleveland Municipal Court, Docket No. 81-2266.

however slight, is sufficient to complete vaginal or anal intercourse.

(B) "Sexual Contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if such person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual Activity" means sexual conduct or sexual contact, or both.

* * *

(F) When considered as a whole, applying local community standards, and judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is "obscene" if the following apply:

(1) Its dominant appeal is to prurient interest; and

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite; or

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality; or

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose; and

(5) When taken as a whole, it lacks serious literary, artistic, political or scientific value.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

The observation by the Sixth Circuit Court of Appeals was in accord with the Ohio

Court of Appeals and the federal district court, each of which noted the close similarity between the Tallmadge obscenity ordinances and the Ohio obscenity statutes (App. 43, 49) and thereafter, relied upon the Ohio Supreme Court's interpretation of the Ohio statutes in evaluating the Tallmadge ordinances. Because of the reliance of the courts below upon the judicial construction of the similar Ohio statutes, interpretations of the Ohio statutes are therefore relevant in assessing the constitutionality of the Tallmadge ordinances.[5/]

The first occasion on which a federal court measured the definition of obscenity embodied in the Ohio statutes against the standards enunciated in Miller occurred when the district court issued

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5/ It is important to note that the Tallmadge ordinances themselves have never been judicially construed by the Supreme Court of Ohio.

the first of two opinions in Sovereign News Co. v. Falke, 448 F. Supp. 306 (N.D. Ohio 1977)("Sovereign I"), remanded, 610 F. 2d 428 (6th Cir. 1979), cert. denied, 447 U.S. 923 (1980), opinion on remand issued Sept. 19, 1980 (N.D. Ohio) ("Sovereign II"), reversed, 674 F. 2d 484 (6th Cir. 1982). On that occasion, District Judge John M. Manos issued a declaratory judgment finding Ohio Revised Code §§2907.01 and 2907.32 unconstitutional. In the course of a scholarly and extensive opinion, he found those statutes to be unconstitutional due to their substantial overbreadth and vagueness and upon a determination that they were not susceptible to an authoritative construction by the state courts that would cure their constitutional infirmities.[6/]

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[6/] While an appeal from the decision was pending in the Sixth Circuit, the Ohio Supreme Court decided State v. Burgun, 56 Ohio St. 2d 354 (1978). In that case, the Ohio Supreme Court, while implicitly conceding that Ohio Revised Code §2907.01 is unconstitutional as written,

The district court enumerated the statute's constitutional infirmities:

> Section 2907.01(F)(3)[to which §76.1(F)(3) corresponds] unconstitutionally restricts the display or depiction of extreme or bizarre violence, cruelty or brutality. It is an express holding of Miller that only material depicting or describing sexual conduct may be barred as being obscene. See, Miller v. California, supra, 413 U.S. at 24, 93 S.Ct. 2607. Therefore, the restrictions placed on the description or depiction of extreme violence unconstitutionally restrains free expression, and the statute is therefore overbroad.

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6/ (cont.)
nevertheless upheld its constitutionality on the theory that the statute could be saved if the three-pronged Miller test for obscenity were merely added to the end of the statutory language by judicial interpretation. The Sixth Circuit then remanded Sovereign v. Falke to the district court for further consideration of the constitutionality of Ohio's obscenity law in light of the Burgun decision (610 F.2d 428). Upon further consideration, District Judge Manos, in another extensive opinion, again found Ohio's obscenity law, even as interpreted in Burgun, to be unconstitutional due to overbreadth and vagueness. His decision was subsequently reversed by the Sixth Circuit, Sovereign News Co. v. Falke, 674 F.2d 484 (6th Cir. 1982). A petition for writ of certiorari is presently pending before this Court for review, Docket No. 81-2326. See also, Turoso v. The Cleveland Municipal Court, 674 F.2d 486 (6th Cir. 1982), Docket No. 81-2266.

> ...Section 2907.01(F)(1)(2)(3) and (5) [to which §76.1 (F)(1)(2)(3) and (5) correspond] unconstitutionally restrict the display and description of nonactive sexual conduct. For example, simple nudity, such as the showing of a female breast or a male buttocks, may be considered obscene under §2907.01(F). A sexual depiction of that kind is not hardcore pornography, and cannot be restricted as being obscene....Therefore, the court finds §2907.01(F)(1)(2)(3) and (5) are overbroad in that they restrict non-hardcore sexual conduct.

The same constitutional infirmities noted by the district court in Sovereign News are present in the Tallmadge ordinances.

B. The Overbreadth And Vagueness Of The Tallmadge City Ordinance As Judicially Construed.

The courts below adopted the analysis of State v. Burgun, 56 Ohio St. 2d 554 (1978), which purported to rectify the constitutional deficiencies in Ohio's obscenity statute via judicial interpretation. The courts thereby claimed to

have cured the vagueness and overbreadth of the statute (App. 52, 99). However, the adoption of the Burgun decision failed to narrow or clarify the overbroad and vague language of the Tallmadge ordinance.

The Ohio Supreme Court in Burgun reached the conclusion that it could uphold the state statute by merely appending the three-pronged Miller test to the statute. District Judge Manos analyzed the effect of this judicial addition to the statutory definition of obscenity in his second opinion in Sovereign News Co. v. Falke, at pp. 12-13:

> In Burgun, the Ohio Supreme Court left the language of Revised Code §2907.01 intact. Instead, it attempted to remedy the statute by merely tacking onto it the three-pronged Miller formula, the second prong of which requires either the state legislature or the state courts to define with specificity what kinds of sexual depictions may be found obscene. The Ohio

> Supreme Court declined to specify what kinds of sexual depictions may be found obscene, however, and left the language of Revised Code §2907.01 completely intact to serve that purpose. The result is that the Ohio Supreme Court created a circular definition of obscenity which always leads to and depends upon the language employed in Revised Code §2907.01 itself.

As the district court noted in Sovereign News II, the Burgun decision altogether failed to reform the Ohio obscenity statute to meet constitutional standards. Similarly, the reasoning of Burgun also completely failed to eliminate the vagueness and overbreadth of the Tallmadge ordinance.

The instant case presents a vastly different scenario than that reviewed and approved by this Court in Ward v. Illinois, 431 U.S. 767 (1977). In Ward, this Court sustained the constitutionality of Illinois' criminal obscenity statute which, unlike the Tallmadge ordinance, was phrased in

simple but general language upon which it was easy to place a limiting judicial gloss that could be harmonized with the actual wording of the statute.[7] This Court upheld the Illinois statute because it had been given an authoritative construction by the state's highest court which not only incorporated into it the Miller guidelines, but also incorporated into it the explanatory examples given in Miller of the kinds of sexual depictions which can validly be regulated under the second prong of the Miller guidelines.

Three important distinctions exist between the curative judicial interpretation in Ward and the alleged curative interpretation of Burgun as applied to Tallmadge City Ordinance §76.1. See,

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[7] The Illinois statute defined obscenity as follows:

> A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters.

Sovereign II, at 16-19. First, unlike the Illinois Supreme Court, the Ohio Supreme Court has affirmed a number of cases which did not involve the patently offensive sexual activity given as an example of prohibited conduct in Miller. See, e.g., State ex rel. Keating v. Vixen, 35 Ohio St. 2d 215 (1973). Secondly, the Tallmadge ordinance defines obscenity in detailed terms which cannot be reconciled with the Miller examples and therefore, cannot be judicially reformed like the Illinois statute. And lastly, the jury instructions given in the three cases which Burgun affirmed did not incorporate the Miller examples into the definition of obscenity read to the jury. On the basis of these facts, it can only be concluded that Burgun did not remedy the overbreadth and vagueness problems of the Ohio obscenity statute, nor that of the Tallmadge ordinance.

In reviewing the constitutionality of the Ohio obscenity statute, the Sixth Circuit in Turoso v. The Cleveland Municipal Court, 674 F. 2d 486 (6th Cir. 1982)(the decision to which the Sixth Circuit panel deferred in the case at bar), focused on the isolated definition of §2907.01(A) which defines sexual conduct. Finding that sexual conduct conformed with the definitional examples supplied by this Court in Miller, the court held the statute not to be unconstitutionally overbroad or vague.

By pursuing this analysis, however, the court ignored the fact that the statutory definition of obscenity is contained, for the most part, in subsection (F) of that statute. Subsection (A), the section on which the court placed great emphasis as a narrow definition of offensive sexual activity, comprises only a portion of the obscenity definition under both the Ohio statute and the Tallmadge ordinance. The

actual definition of obscenity contained in the ordinance is, in fact, far broader and therefore, the specific definition in subsection (A) in no way acts to remedy the ordinance's overbreadth deficiencies.

An examination of the ordinance demonstrates these overbreadth problems. The Tallmadge ordinance censors depictions of nudity, defined so broadly as to include the showing of any portion of a female breast "below the top of the nipple" and the showing of a male or female buttock with "less than a full opaque covering." See Tallmadge City Code of Ordinances §76.1(H). The ordinance still defines as obscene the depiction of "sexual contact," which in turn includes a depiction of a man touching a woman's thigh. See Tallmadge City Code of Ordinances §76.1 (B) and (C). The ordinance still outlaws depictions of extreme or bizarre violence, cruelty and brutality. Tallmadge City

Code of Ordinances §76.1(B)(5). And the ordinance still censors expression whose "dominant appeal is to prurient interest," without specifying the kinds of sexual conduct the description or depiction of which is prohibited by the phraseology.

The Sixth Circuit decision to uphold the Tallmadge obscenity ordinance will have a far-reaching effect on the law of obscenity throughout the nation. The Sixth Circuit has expanded Ward in a way never intended by this Court. It has taken an ordinance whose actual language is at war with Miller and upheld it, not, as Ward permits, because the state's highest court had by judicial construction affirmatively removed or limited those actual words of an analogous statute which render it facially overbroad and vague, but rather, despite the refusal of the state's highest court to do so. In the name of Ward, it has taken an ordinance

whose language directly conflicts with Miller and, in sustaining it, has required nothing more than the bare assertion by the state's highest court that the language can peacefully co-exist side by side with the Miller test without any reconciliation of the conflicts between the two.

This important decision by a federal court of appeals has breathed new life into the very kinds of broadbased statutes and ordinances outlawing speech which Miller was fashioned to eradicate and Ward did not intend to revive. It represents an open invitation to state legislatures and city councils to enact criminal obscenity laws which broadly stifle protected expression and holds out the promise to them that these laws will withstand constitutional attack so long as the Miller guidelines are inserted as a footnote to the statutory language by judicial construction.

This Court should grant certiorari to avert the unlawful suppression of free speech and clearly draw the permissible boundaries of state and local regulation.

## CONCLUSION

For all of the foregoing reasons, petitioner urges this Court to grant her petition for a writ of certiorari.

Respectfully submitted,

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No. 81-3202

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LOIS CHAPMAN,

Petitioner-Appellant

v. ORDER

ANTHONY J. CARDARELLI, Sheriff of Summit County, Ohio; WILLIAM PIKE, Judge Municipal Court, Cuyahoga Falls, Ohio,

Respondents-Appellees

_____/

Before: KENNEDY and MARTIN, Circuit Judges; and CECIL, Senior Circuit Judge.

This habeas corpus petitioner appeals the denial of her writ alleging the unconstitutionality of the criminal obscenity ordinances under which she was convicted. Her challenge to the City of Tallmadge ordinances claims that they are unconstitutionally

overbroad and vague. She also challenges her conviction because the prosecution failed to present at trial expert witnesses who could testify to the obscene materials appeal to the prurient interest of the deviant group to which the subject material was directed.

Because the Tallmadge obscenity ordinances mirrors almost identically the Ohio state obscenity statute, we have held this case until the constitutionality of that statute could be decided by another panel of this court. That decision, Turoso, et al. v. Cleveland Muncipal Court, et al., Nos. 80-3696, etc. (February 4, 1982), has been reported. There the Ohio obscenity statutes were adjudged constitutional. The Tallmadge ordinances, being more tightly drafted and so more protective of the First Amendment than the Ohio statute, are therefore constitutional as well. Hence petitioner's first

argument must fail.

Furthermore, petitioner was not convicted on the basis of insufficient evidence. See Jackson v. Virginia, 443 U.S. 307 (1979). The facts of this appeal do not present the extreme case noted at footnote 6 to the court's opinion in Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973). Instead the subject matters of the materials here, nudity, sexual intercourse, and oral sex, are not so far removed from the realm of average human experience that the jury could be said to have been incapable of reaching a fair verdict without the aid of expert testimony.

The judgment of the lower court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

WHITE, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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| LOIS CHAPMAN, Petitioner | ) | |
| v. | ) | ORDER |
| SHERIFF ANTHONY J. CARDARELLI, ET AL., Respondents | ) | C80-974A |

Upon consideration of the application of petitioner for a Certificate of Probable Cause for Appeal,

IT IS ORDERED that the application of the petitioner for a Certificate of Probable Cause is hereby granted and the Court certifies that the appeal is not frivolous.

/s/George W. White
George W. White
United States
District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

| | | |
|---|---|---|
| LOIS CHAPMAN<br><br>Petitioner<br><br>vs.<br><br>SHERIFF ANTHONY CARDARELLI, et al.<br><br>Respondents | ) | C80-974A<br><br><br><br><br><br>MEMORANDUM AND ORDER |

This is an action to review a petition for habeas corpus relief.

Petitioner Lois Chapman was charged with pandering obscenity in violation of the Tallmadge City Ordinance §76.11.[1/] She was tried, convicted, fined and sentenced to serve thirty (30) days in the Summit County jail. The Petitioner appealed to the Summit County Court of Appeals alleging that the ordinances under which she was convicted were unconstitutional and that the prosecution

failed to prove each element of the offense charged. The Court of Appeals overruled both assignments of error and affirmed petitioner's conviction. The petitioner presented the same arguments to the Supreme Court of Ohio which dismissed the appeal for want of substantial constitutional question. The petitioner then filed a writ of certiorari in the United States Supreme Court and the petition was denied.

The petitioner then filed for habeas corpus relief in this Court, and was granted bail, pending the Court's disposition of the petition. The case was referred to the United States Magistrate for a report and recommendation pursuant to Local Civil Rule 19.8. This matter is now before the Court upon the objections of the plaintiff to the magistrate's report and recommendation filed November 13,

1980 denying the petition. According to 28 U.S.C. §636(b)(1)(c),

> "a judge of the Court shall make a de novo determination of those portions of the report or specified purposed findings or recommendations to which objection is made. A judge of the Court may accept, reject, or modify in whole or in part the findings or recommendations made by the magistrate."

The petitioner objects to the recommendation that the petition be denied and to the finding that the jury instructions given by the trial court could cure the Tallmadge obscenity ordinance of constitutional overbreadth and vagueness. The petitioner also objects to the finding that the record did not demonstrate that the materials appealed to deviant groups and to the finding that the defense, rather than the prosecution, stressed the materials prurient appeal to sexually deviant groups.

The City of Tallmadge Ordinance §76.11 prohibiting the pandering of obscenity and §76.1 defining the terms of the ordinance are almost identical to the State of Ohio obscenity statute R.C. §2907.01 and §2907.32 respectively. The Ohio R.C. §2907.01 and §2907.32 have been challenged as vague and overbroad in the federal and state courts on more than one occasion with conflicting decisions as to the statute's constitutionality.[2/] In determining the instant obscenity ordinance's constitutionality, this Court's inquiry begins with the standards of Miller v. California, 413 U.S. 25 (1973). In Miller v. California, supra, the Supreme Court delineated the permissible scope of state statutes regulating obscenity to works depicting or describing sexual conduct and formulated three basic guidelines for the trier of fact to

determine whether a work is obscene:

(a) Whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest,

(b) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(c) Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Id., at 24 (footnote and citations omitted).

The Court also gave examples of what could be regulated by a state under the second part of the Miller guidelines:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals. Id., at 25.

Finally, the Court ruled that the proscribed sexual conduct may be defined by the applicable state law, "as written or authoritatively construed," (emphasis added), since it was not the Court's intention to require the States to enact new obscenity statues. Id., at 24 n. 6.

The Ohio Supreme Court has interpreted R.C. §2907.01(F) defining obscenity to incorporate the Miller guidelines. State v. Thomas, 57 Ohio St. 2d 71, 387 N.E. 29 229 (1979); State v. Burgun, 56 Ohio St 2d 354, 384 N.E. 2d 255 (1978). In State v. Burgun, supra, the Ohio Supreme Court ruled that the Miller test for defining obscenity was to be incorporated into the state statute by the Court's authoritative construction. Id., 384 N.E. 2d at 261. The Ohio Court concluded that R.C. §2907.01(F) is neither unconstitutionally

overbroad nor void for vagueness when it is read in pari materia with the Miller decision. Id. The Ohio Supreme Court has reaffirmed its construction of O.R.C. §2907.01(F) in State v. Thomas, supra.

The incorporation of the Miller guidelines into the Ohio statute by Burgun requires that all three parts of the Miller guidelines be proved in addition to one or more of the five sections of O.R.C. §2907.01 defining obscenity. In Burgun, The Ohio Supreme Court upheld the pandering convictions where the jury was instructed as to obscenity under the Ohio statute and then read the more restrictive definition of obscenity under Miller.

In the instant case, the trial court instructed the jury as to the Tallmadge Ordinance defining obscenity

and then read the three part Miller guidelines. The trial court further instructed the jury that:

> "[A]ll three of these factors must be considered by you, and in order to find that the material involved in this matter is obscene, you must find that all three factors are present in this case."

The Court adopts the magistrate's finding that in order to find the material obscene, the jury in petitioner's case was required to find that the material appealed to the prurient interest, that it contained patently offensive depictions or descriptions of specific sexual conduct, and that it lacked any serious literary, artistic, political or scientific value.

It is the opinion of this Court that the Tallmadge City Ordinance, when construed in pari materia with the guidelines of Miller v. California,

supra is neither constitutionally vague nor overbroad.

Finally the petitioner objects to the magistrate's finding that the record did not demonstrate that the materials applied to deviant groups and that the defense, rather than the prosecution, stressed the materials prurient appeal to sexually deviant groups.

The Court adopts the following two paragraphs, taken from the magistrate's report, which reflect the correct statement of the law regarding the Federal Court's jurisdiction to review state criminal convictions where the habeas corpus petitioner has challenged the sufficiency of the evidence underlying his conviction.

The due process clause of the Fourteenth Amendment unquestionably requires that a person accused of a

crime not be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In Re Winship, 397 U.S. 358 (1970), Mullaney v. Wilbur, 421 U.S. 684 (1975); Patterson v. New York, 432 U.S. 197 (1977); Jackson v. Virginia, 443 U.S. 307 (1979).

> "We entertain no doubt that as a matter of federal due process the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged."

Berrier v. Egeler, 583 F.2d 515 (6th Cir. 1978); Speigner v. Jago, 603 F. 2d 1208 (6th Cir. 1979).

In Jackson v. Virginia, the Supreme Court held that when habeas petitioners challenge the sufficiency of evidence federal courts are required by Winship to determine whether the evidence of record could reasonably support a find-

ing of guilty beyond a reasonable doubt. Jackson, supra, at 318. In making this determination, the federal court must decide, after reviewing the evidence in the light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson supra, at 319. Thus, where the Court finds that no rational trier of fact could have found proof beyond a reasonable doubt the petitioner is entitled to habeas corpus relief. Jackson, supra, at 324. The Court expressly held that this standard of review

> "must be applied with explicit reference to the substantive elements of the criminal offense are defined by state law."

Jackson, supra, at 577 n. 16.

The Court adopts the magistrate's conclusion that the record does not

demonstrate, nor has the petitioner shown, that the materials which were gravaman of petitioner's conviction were intended for such a bizarre deviant group that experience of the trier of fact would be plainly inadequate to judge whether the material appealed to the prurient interest as required by Mishkin v. New York, 383 U.S. 502 (1966).

The Court finds that the Ordinance in this case construed in pair materia with Miller allowed a finding of obscenity where the material appeals to the prurient interest of normal adults.

The Court adopts the magistrate's conclusion that one cannot find that

> "no rational trier of fact could have found proof beyond a reasonable doubt of each element of the offense."

The petitioner's objection and second

ground for habeas corpus relief is denied.

The habeas corpus petition of Lois Chapman is denied.

IT IS SO ORDERED.

/s/George W. White
George W. White
UNITED STATES
DISTRICT JUDGE

## Footnotes

1/ "76.11--Pandering Obscenity

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material, when the offender knows that such material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when he is reckless in that regard;

(2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material;

(3) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;

(4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged;

(5) Possess or control any obscene material with with purpose to violate division (A), (2) or (4) of this section.

(6) Exhibit obscene material by movie, film or other commercial manner which may be observed by persons, whether minor or adult, who have not by their own choosing entered an enclosed building wherein the same are being depicted.

The exhibition of any such obscene material upon any location not completely within an enclosed building shall be prima facie evidence of the violation of this section.

(B) It is an affirmative defense to an charge under this section, that the material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.

(C) This section shall not apply if the offender has previously been convicted of a violation of this section or of section 76.10 of the Tallmadge City Code of Ordinances, or a violation of Section 2907.31 or 2907.32 of the Ohio Revised Code.

(D) Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree."

Section 76.1 defines the terms used in §76.11:

§76.1--Definitions

As used in sections 76.1 to 76.99 of the Tallmadge City Code of Ordinances:

(A) "Sexual Conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(B) "Sexual Contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if such person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual Activity" means sexual conduct or sexual contact, or both.

* * *

(F) When considered as a whole, applying local community standards, and judged with reference to ordinary adults,

or, it it is designed for sexual deviates or other specially susceptible group, judged with reference to such group, any material or performance is "Obscene" if the following apply:

(1) Its dominant appeal is to prurient interest; and

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite; or

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality; or

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose; and

(5) When taken as a whole, it lacks serious literary, artistic, political or scientific value.

* * *

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

2/ See Sovereign News Company v. Falke, 448 F. Supp. 306 (N.D. Ohio 1977), [unconstitutional]

sub nom Sovereign News Company v. Corrigan, 610 F. 2d 428 (6th Cir. 1979) remanded;

Sovereign News Company v. Falke, C79-230 slip opinion, J. Manos September 19, 1980 [unconstitutional];

Turoso v. Cleveland Municipal Court C79-1010, slip opinion September 15, 1980, J. Thomas [constitutional];

Lee v. Cleveland Municipal, C79-474 slip opinion January 29, 1981 J. Aldrich [unconstitutional];

State v. Burgun, 56 Ohio St. 2d 354, 384 N.E. 2d 255 (1978) [constitutional]

State v. Thomas, 57 Ohio St. 2d 71, 387 N.E. 2d 229 (1979) [constitutional]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|---|---|---|
| LOIS CHAPMAN, | ) | CIVIL ACTION |
| | ) | NO. C80-974-A |
| Petitioner, | ) | |
| | ) | Judge George W. |
| vs. | ) | White |
| | ) | |
| SHERIFF ANTHONY CARDARELLI, et al., | ) | REPORT AND RECOMMENDATION OF |
| | ) | MAGISTRATE |
| Respondent, | ) | |
| | ) | Magistrate Charles |
| | ) | R. Laurie |

Petitioner, Lois Chapman, initiated this action for habeas corpus relief pursuant to 28 U.S.C. §2254 on June 12, 1980. United States District Court Judge George W. White referred the case to this Magistrate for a report containing proposed findings of fact, conclusions of law, and a recommended disposition of the case.

HISTORY OF PROCEEDINGS

On November 30, 1978, a jury in the Municipal Court of Cuyahoga Falls

convicted petitioner of three (3) counts of pandering obscenity in violation of Sections 76.11(A)(2) and (5) of the Tallmadge City Code of Ordinances. The court fined petitioner $2,000.00 and sentenced her to serve thirty (30) days in the Summit County Jail. City of Tallmadge v. Chapman, Nos. 78 CRB 1144, 1145 (Cuyahoga Falls Mun. Ct. 1978).

Petitioner took an appeal to the Summit County Court of Appeals, Ninth Judicial District, alleging that the ordinances under which she was convicted were unconstitutional and that the prosecution had failed to prove each element of the offense charged. The Court of Appeals overruled both assignments of error and affirmed petitioner's conviction. City of Tallmadge v. Chapman, No. 9140 (C.A. Summit Co. 1979).

Petitioner presented the same arguments to the Supreme Court of Ohio. The Supreme Court, however, dismissed the appeal for want of substantial constitutional question. City of Tallmadge v. Chapman, No. 79-1260 (Ohio Supreme Court 1979).

Petitioner then filed a petition for a writ of certiorari with the United States Supreme Court on the grounds that the prosecution failed to produce expert testimony as to the material's prurient interest to members of the deviant group to which it is directed. The United States Supreme Court denied the petition for certiorari. Chapman v. City of Tallmadge, No. 79-1450 (U.S. Sup. Ct. 1980).

Petitioner is now before the United States District Court for the Northern District of Ohio, Eastern Division, seeking relief in federal habeas corpus.

As grounds for relief, petitioner sets forth the following allegations:

1. The Tallmadge obscenity ordinance under which petitioner was convicted is overbroad and vague in violation of the First and Fourteenth Amendments.

2. The prosecution failed to offer expert testimony to prove the essential element of the material's appeal to the prurient interest of the deviant group to which the subject material was directed.

LAW AND ARGUMENT

In the case of Miller v. California, 412 U.S. 15 (1973), the United States Supreme Court laid down the now familiar three part test for determining whether material is obscene.

> The basic guidelines for the trier of fact must be: (a) whether the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work

> depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work taken as a whole, lacks serious literary, artistic, political or scientific value. Miller, supra, at 24.

The Court in Miller also expressly limited the constitutionally permissable scope of regulation to "works which depict or describe sexual conduct ... specifically defined by state law, as written or authoritatively construed." Miller, supra, at 23-24. According to Miller, only the depiction so-called "hard core" sexual conduct may be restricted. The Court would include in this category patently offensive representations or descriptions of "ultimate sexual acts, normal or perverted, actual or simulated,... masturbation, excretory functions, and lewd exhibition of the genitals."

Miller, supra, at 25. In Jenkins v. Georgia, 418 U.S. 153 (1974) and Erznoznik v. Jacksonville, 422 U.S. 205 (1975), the Supreme Court held that the depiction or description of simple nudity, without sexual action, cannot be characterized as obscene.

Sections 76.11(A)(2) and (5) of the Tallmadge City Code Ordinances, under which petitioner was convicted, provide as follows:

> (A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:
>
> ***
>
> (2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material;
>
> ***
>
> (5) Possess or control any obscene material with purpose to violate division (A)(2) or (4) of the section.

The defintion of "obscene", as the word

is used in Sections 76.11(a)(2) and (5), appears in Section 76.1(F) as follows:

> (F) When considered as a whole, applying local community standards, and judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specifically susceptible group, judged with reference to such group, any material or performance is "obscene" if the following apply:
>
> (1) Its dominant appeal is to prurient interest; and
>
> (2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite; or
>
> (3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality; or
>
> (4) Its dominant tendency is to appeal to scatological interests by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without

serving any genuine scientific, educational, sociological, moral or artistic purpose; and

(5) When taken as a whole, it lacks serious literary, artistic, political, or scientific value.

In its instructions to the jury, the trial court in petitioner's case read Section 76.1(F) as well as the following language:

Ladies and gentlemen of the jury, the United States Supreme Court has set basic guidelines for the trier of fact, which must be taken into consideration in addition to the ordinances which I have read.

(1) Whether the average person, applying contemporary community standards would find that the material, taken as a whole, appeals to the prurient interest.

(2) Whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law or city ordinance, and

(3) Whether the work taken as a whole, lacks serious literary, artistic, political, or scientific value.

All three of these factors must be

> considered by you, and in order to find that the material involved in this matter is obscene, you must find that all three factors are present in this case. (Emphasis added).

The trial court defined the phrase "sexual conduct" as follows:

> Sexual conduct means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

This definition was taken directly from Tallmadge City Ordinance Section 76.1(H).

Petitioner contends that the definition of obscenity in Section 76.1(F) is unconstitutionally overbroad in that it classifies as obscene the depiction of violence and simple nudity. She also argues that the definition is unconstitutionally vague because it fails to specify the types of sexual

conduct which may not be depicted or described. This Magistrate, however, concludes that the definition of obscenity applied by the trial court, and under which petitioner was convicted, was neither overbroad nor vague.

First, the trial court included the conjunctive three part Miller test in its jury instructions, and expressly admonished the jury that all three factors had to be proven before it could find the material obscene. Thus, in order to find the material obscene, the jury in petitioner's case was required to find that the material appealed to the prurient interest, that it contained patently offensive depictions or descriptions of specific sexual conduct, and that it lacked any serious literary, artistic, political, or scientific value. Under

these instructions, the jury could not find the material obscene simply because it contained depictions of violence or nudity. The instructions would not permit a finding that the material was obscene unless it depicted sexual conduct.

Secondly, the court provided a very specific definition of "sexual conduct" drawn directly from the city ordinances. The list of activities in the court's definition of "sexual conduct" clearly constitute "ultimate sexual acts, normal or perverted, actual or simulated," which according to Miller may be restricted.

Under the instructions in petitioner's case, the jury could find the material obscene only if it first determined (1) that it appealed to the prurient interest and (2) that it contained

patently offensive depictions or descriptions of sexual conduct, which was specifically defined as vaginal or anal intercourse, fellatio, or cunnilingus, and (3) that it lacked serious literary, artistic, political or scientific value. Accordingly, the definition of obscenity under which petitioner was convicted fully complied with the Miller criteria, did not restrict constitutionally protected expression, and did define the types of conduct which may not be depicted with adequate specificity. Petitioner's first ground for relief should, therefore, be dismissed.

II

As he second ground for relief, petitioner asserts that the prosecution failed to prove each element of the offense beyond a reasonable doubt and

that petitioner's conviction, therefore, violated her right to due process. She contends that the prosecution failed to prove that the materials appealed to the prurient interest of sexually deviant groups which, according to petitioner, were the intended targets of the materials in question.

The due process clause of the Fourteenth Amendment unquestionably requires that a person accused of a crime not be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358 (1970); Mullaney v. Wilbur, 421 U.S. 684 (1975); Patterson v. New York, 432 U.S. 197 (1977); Jackson v. Virginia, 443 U.S. 307 (1979) "We entertain no doubt that as a matter of federal due process the prosecution must prove beyond a reason-

able doubt every fact necessary to constitute the crime charged." Berrier v. Egeler, 583 F.2d 515 (6th Cir. 1978); Speigner v. Jago, 603 F.2d 1208 (6th Cir. 1979).

In Jackson v. Virginia, the Supreme Court held that when habeas petitioners challenge the sufficiency of evidence, federal courts are required by Winship to determine whether the evidence of record could reasonably support a finding of guilty beyond a reasonable doubt. Jackson, supra, at 318. In making this determination, the federal court must decide, after reviewing the evidence in the light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson, supra, at 319. Thus, where the court finds that no rational trier of fact could have found proof beyond a reasonable doubt the petitioner is entitled to habeas corpus

relief. Jackson, supra at 324. The Court expressly held that this standard of review "must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." Jackson, supra, at 577 n. 16.

The record in this case does not demonstrate, nor has petitioner otherwise shown, that the materials involved here were intended for "such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest." Mishkin v. New York, 383 U.S. 502 (1966). Despite petitioner's assertion to the contrary, a review of the transcript reveals that the defense, not the prosecution, focussed on the material's appeal to the prurient appeal of sexual deviants. In

support of this ground for relief, petitioner can only speculate that the jury may have considered the material's appeal to deviant groups. The ordinance in this case as well as the first Miller criterian allow a finding of obscenity where the material appeals to the prurient interest of normal adults. Based upon a thorough review of the record in the light most favorable to the prosecution, this Magistrate cannot find that "no rational trier of fact could have found proof beyond a reasonable doubt of each element of the offense." Thus, petitioner's second ground for relief should be denied.

## CONCLUSION

Following an exhaustive review of the pleadings, transcript, briefs, and applicable state and federal law, this

Magistrate reaches the following conclusions:

1. Petitioner has failed to meet her burden of demonstrating a violation of any rights under the Constitution laws, or treaties of the United States as required by 18 U.S.C. §2254. Allen v. Perini, 424 F. 2d 134 (6th Cir. 1970).

2. An evidentiary hearing is not required under the criteria of 28 U.S.C. §2254(d). See: Townsend v. Sain, 372 U.S. 293 (1963).

This Magistrate, therefore, respectfully recommends to the District Court that the petitioner's application for habeas corpus be denied and dismissed.

/s/ Charles R. Laurie
CHARLES R. LAURIE
UNITED STATES MAGISTRATE

CERTIFICATION

I hereby certify that a copy of the foregoing instrument was forwarded to

Mr. Carmen V. Roberto, Law Director, City of Cuyahoga Falls, 2310 Second Street, Cuyahoga Falls, OH 44222 and to Mr. George Palda, Attorney for Petitioner, 2121 The Illuminating Building, 55 Public Square, Cleveland, OH 44113, this 13th day of November, 1980, by regular United States Mail.

/s/ Charles R. Laurie
CHARLES R. LAURIE
UNITED STATES MAGISTRATE

Lois CHAPMAN, petitioner, v. CITY OF TALLMADGE. No. 79-1450

Petition for writ of certiorari to the Supreme Court of Ohio.

May 12, 1980. Denied.

Mr. Justice BRENNAN, Mr. Justice STEWART and Mr. Justice MARSHALL would grant certiorari and reverse the conviction. 100 S.Ct. 2176.

THE SUPREME COURT OF OHIO

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|---|---|
| THE STATE OF OHIO,<br><br>City of Columbus. | 1979 TERM<br><br>To wit: October 19, 1979 |
| City of Tallmadge,<br><br>Appellee,<br><br>v.<br><br>Lois Chapman,<br><br>Appellant. | CA. 9140<br>No. 79-1260<br><br>APPEAL FROM THE COURT OF APPEALS<br><br>for Summit County |

This cause, here on appeal as of right from the Court of Appeals for Summit County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

Holmes J. not participating

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Summit County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____ day of NOV 8 1979 19_____

_____Clerk

_____Deputy

| | | |
|---|---|---|
| STATE OF OHIO ) | | IN THE COURT OF |
| ) | ss: | APPEALS NINTH |
| SUMMIT COUNTY ) | | JUDICIAL DISTRICT |

| | |
|---|---|
| CITY OF TALLMADGE | ) CA. No. 9140 |
| | ) |
| Plaintiff-Appellee | ) |
| | ) APPEAL FROM |
| v. | ) JUDGMENT ENTERED |
| | ) IN THE CUYAHOGA |
| LOIS CHAPMAN | ) FALLS MUNICIPAL |
| | ) COURT OF SUMMIT |
| Defendant-Appellant | ) COUNTY, OHIO |
| | ) C.A. No. 78 CRB 1145 |

DECISION AND JOURNAL ENTRY

Dated: July 18, 1979

This cause was heard June 18, 1979, upon the record in the trial court, including the transcript of proceedings, and the briefs. It was argued by counsel for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

---

HUNSICKER, J.

On November 30, 1978, a jury in the

Cuyahoga Falls Municipal Court entered three verdicts of guilty against Lois Chapman for violation of various sections of Chapter 76 of the Public Morality law of the City of Tallmadge, a territory within the jurisdiciton of that court.

From the judgment entered on the jury's verdict, Lois Chapman appeals to this court, saying:

ASSIGNMENT OF ERROR I

"Tallmadge city code of ordinances, Sections 76.1 et seq., are unconstitutional on their face, and the court erred in permitting appellee to try and convict appellant thereunder."

ASSIGNMENT OF ERROR II

"The trial court erred in overruling appellant's motion for judgment of acquittal, as the state failed to produce evidence as to the prurient appeal and/or patent offensiveness of the materials alleged to be obscene, or to prove scienter."

The evidence established conclusively that Lois Chapman as manager of the Avenue Book Store in Tallmadge had full and complete knowledge of the nature and contents of the materials, books, papers and magazines she sold. She denied knowledge of the contents of the material she dispensed but it was obvious that she could not be believed in this instance. The news store has two sections, one in which current newspapers and magazines are sold and the other in which Doc Johnson's "love products", dildoes, vibrators, soap in the shape of vaginas and penises, and sexually oriented magazines are sold. The section where the "love products" and sexually oriented magazines were sold was limited to those over 21 years of age. The manager at the cashier counter could see all persons in either section. State v. Burgun, 56 Ohio St. 2d 354 (1978).

An examination of the papers and magazines introduced as evidence showed such exhibits to depict fellatio, cunnilingus, bestiality and sexual conduct. The persons shown were nude and with close view of the area depicted. The state thus produced overwhelming evidence justifying the jury in finding prurient appeal, the patent offensiveness and obscene character of the material sold. The material here was hard core pornography. We reject assignment of error II.

This court has read the testimony and proceedings in its entirety. There is comment in the brief on the conduct of the jury or some member thereof and a comment concerning a Bible and a magazine in the jury room but no claim of error is based on these subjects. Hence, they are not considered in this appeal. We confine ourselves to the errors assigned.

The Ordinance, Chapter 76, of the City of Tallmadge is before this court. The verdicts find Lois Chapman (1) guilty of the offense of "pandering obscenity" Tallmadge Ordinance §76.11 (A)(2) June 15, 1978; (2) pandering obscenity, Tallmadge Ordinance §76.11 (A)(5), July 1, 1978; (3) pandering obscenity, Tallmadge Ordinance §76.11 (A)(2) July 1, 1978.

The sections of the Codified Ordinances of the City of Tallmadge named in the verdicts returned by the jury are:

Section 76.11(A)(2) which reads:

> "(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:
>
> "***
>
> "(2) Exhibit or advertise for sale or dissemination or sell or publicly disseminate or display any obscene material;"

Section 76.11 (A)(5):

> "Possess or control any obscene material with purpose to violate division (A)(2) or (4) of this section."

"Obscene" is defined in Section 76.1 (F)(1) through (5) as follows:

> "(F) When considered as a whole, applying local community standards, and judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to such group, any material or performance is "Obscene" if the following apply:
>
> "(1) Its dominant appeal is to prurient interest; and
>
> "(2) Its dominant appeal is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite; or
>
> "(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or

bizarre violence, cruelty, or bestiality; or

"(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral or artistic purpose; and

"(5) When taken as a whole, it lacks serious literary, artistic, political or scientific value."

Do those sections under which Lois Chapman was convicted meet the test of obscenity as set out in the case law of Ohio and the federal courts?

The principal cases cited by counsel relate in large measure to books which present a different view than the picture magazines here where very little material is by means of printed words. Nevertheless, the cases are uniform in

holding that "obscenity is not within the area of constitutionally protected speech or press" Miller v. California, 413 U.S. 15, 23 (1973); Roth v. United States, 354 U.S. 476, 485 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

The business of Avenue News, Lois Chapman's employer, was to sell these obscene magazines for a profit and as was said in Ginzberg v. United States, 383 U.S. 463, 471 (1966):

> "***'[i]f the object [of a work] is material gain for the creator through an appeal to the sexual curiosity and appetite,' the work is pornographic. ***"

The court in Miller v. California, supra, at 24, said:

> "*** As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. ***"

Depict means to show a likeness of the object by painting or drawing. That

is what we have here and very little, if any, word description.

The answer to our question is found in Miller v. California, supra, at 25, which said:

> "We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (B) of the standard announced in this opinion, supra:
>
> "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> "(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.
>
> "Sex and nudity may not be explored without limit by films and pictures exhibited or sold in places of public accomodation any more than live sex and nudity can be exhibited or sold without limit in such public places. ***"

All of the proscribed depictions were in the material found in the Avenue News Store and all were introduced as exhibits here and admitted to be in the store by the material introduced by the appellant when presenting a defense.

The jury, composed of citizens of the community, surely by their verdict determined that the exhibits herein had no literary, artistic, political or scientific value.

Expert evidence was not required to prove the magazines and papers herein were obscene since the jury from the community had full opportunity to examine them at length in the jury room.

> "*** The States have a long-recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accomodation, as long as these regulations do not run afoul of specific constitutional prohibitions. ***"

"***

"'In an unbroken series of cases extending over a long stretch of this Court's history, it has been accepted as a postulate that 'the primary requirements of decency may be enforced against obscene publications.'"

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57 (1973).

In Roth v. United States, supra, at 484, 485, the court said:

"*** implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. ***

"We hold that obscenity is not within the area of constitutionally protected speech or press."

"***."

The ordinance in question, in the instant case, prohibits the possession and sale of obscene materials to be judged by a jury not on the basis of a survey of the city to establish proof

of specific harmful social effect. The jury represents the average persons in the community and by law they determine if the exhibits were obscene, not a social survey.

In Roth v. United States, supra at 491, the court said:

> "It is argued that the statutes do not provide reasonably ascertainable standards of guilt and therefore violate the constitutional requirements of due process. Winters v. New York, 333 U.S. 507, 92 L ed 840 68 S Ct. 665. The federal obscenity statute makes punishable the mailing of material that is 'obscene, lewd, lascivious, or filthy *** or other publication of indecent character.' The California statute makes punishable, inter alia, the keeping for sale or advertising material that is 'obscene or indecent.' The thrust of the argument is that these words are not sufficiently precise because they do not mean the same thing to all people, all the time, everywhere.
>
> "Many decisions have recognized that these terms of obscenity statutes are not precise.

"This court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. ***."

We admit that not all of the cases we have cited deal with the sale of "picture" magazines which we have in the instant case, but most of the cases we have cited bear on the question of how pornographic material relates to enforcement of laws covering similar language to that employed in the ordinance of the City of Tallmadge.

On the subject of overbreadth of an ordinance prohibiting claimed constitutionally protected conduct, the court in Grayned v. City of Rockford, 408 U.S. 104, 114, 115 (1972) said:

"A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct. ***

"The crucial question, then, is whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments. ***."

The Ohio Supreme Court in State v. Phipps, 58 Ohio St. 2d 271 (1979) discussed a clam of "vagueness" and cited Conally v. General Construction Co., 269 U.S. 385 (1926), in finding that a statute is not vague where men of common intelligence do not have to guess as to its meaning and differ as to its application. Pandering hard core pornography is not constitutionally protected under the First Amendment.

As one reads Chapter 76 of the ordinances of the City of Tallmadge and especially 76.1(F) 1 through 5, we see almost a verbatim statement of R.C. 2907.01(F) about which the Ohio Supreme Court said in State v. Burgun, supra:

> "1. R.C. 2907.01(F), which sets forth the definition of 'obscenity,' is neither unconstitutionally over-broad nor void for vagueness when it is authoritatively construed to incorporate the guidelines prescribed in Miller v. California, 413 U.S. 15.

"2. Precise knowledge of the contents of obscene material is not a prerequisite to satisfy the requirement of scienter to sustain an obscenity conviction. Knowledge of the character or nature of obscene material is a constitutionally adequate indicium of scienter to sustain a conviction under R.C. 2907.32(A)(4)."

We reject assignment of error I.

The judgment is affirmed.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the Cuyahoga Falls Municipal Court to carry this judgment into execution, shall issue out of this Court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the

journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

/s/ Sam H. Bell
Presiding Judge
- for the Court -

BELL, P.J.
CONCURS IN JUDGMENT ONLY - SAYING:

My concurrence is limited to the specific facts here.

MAHONEY, J.
CONCURS IN JUDGMENT ONLY

APPEARANCES:
HOWARD M. ALLISON, Attorney at Law, 560 Citizens Savings Bldg. Canton, Ohio 44702 and
ELIZABETH REILLY, Attorney at Law, Suite 300 - 73 E. Mill St., Akron, Ohio 44308 for Appellant

CARMEN V. ROBERTO, Law Director, 2310 Second Street, Cuyahoga Falls, Ohio 44221 for Appellee

IN THE MUNICIPAL COURT OF CUYAHOGA FALLS

SUMMIT COUNTY, OHIO

| | | |
|---|---|---|
| CITY OF TALLMADGE | ) | CASE NO. 78 CRB 1144<br>78 CRB 1145 |
| Plaintiff | ) | |
| | ) | JUDGE WILLIAM B. |
| -vs- | | PIKE |
| | ) | |
| LOIS CHAPMAN | ) | O P I N I O N |
| Defendant | | |

* * * * *

PIKE, J. This matter came on for hearing on the motion of the Defendant, moving the Court to dismiss the above captioned case for the reason that the Tallmadge Ordinance under which the Defendant is charged is unconstitutional.

The Defendant, in his brief in support of the motion, alleges that the Tallmadge City Ordinance 140-1973, section 76.1(F) in its overbreadth and vagueness includes conduct which is clearly protected by the free speech provision of the First Amendment of the

United States Constitution. They further go on to say that although the Tallmadge Ordinance resembles the guidelines set forth in Miller vs. United States 413 U.S. 15 (1973). The provisions set forth are over broad since even if the ordinance is clear in what it forbids it is too broad that innocent behavior is classified as criminal. The Defendant further goes on to say that since Ohio Revised Code section 2907.01 was held unconstitutional in the cases of Sovereign News Company vs. Falke C77-230 U.S. Dist. Ct. for the Northern Division of Ohio, Eastern Division and the case of State vs. Gilkes, Case No. 77 CRB 05417 (Akron Municipal Court 1978), the Tallmadge Ordinance should also be held unconstitutional because certain sections of the ordinance use the exact same description as outlined in Ohio Revised Code section 2907.01.

The Plaintiff in its brief, contends that the Tallmadge Ordinances upon which the instant prosecution is based are constitutionally sound and the rulings in Sovereign News vs. Falke, supra and State of Ohio vs. Gilkes, supra are not only inapplicable but bad law as well. They further point out in their brief that the question becomes whether or not the Tallmadge Ordinance is capable of a construction which can confine its operation within constitutional ambits. The Plaintiff unequivocally states that the answer to the above is "yes".

This Court has great respect for the opinions given by the learned judges in the aforementioned cases and I will in no way attempt to question their decisions in those cases. This Court will rule on the constitutionality of the City of Tallmadge Ordinance relating to this subject.

The Ohio laws against obscenity do not specifically define the word "obscene", they merely state that material is obscene if certain guidelines are met. That the laws contain no such definition is well understandable, for the word "obscene" as used in criminal statutes or ordinances is sufficiently precise to meet the constitutional standards of certainty, and the word "obscene" or "obscenity" is not a legal term and is not susceptible of a definitely restrictive interpretation. 34 O.Jur. 2d 156.

Under the State of the law of Ohio, the Courts are impelled to fix their own tests as to what is "obscene" in regard to literature, pictures, etc., subject to the decisions of the United States Supreme Court on federal constitutional questions.

Comparing Ohio Revised Code section 2907.01 and Tallmadge Ordinance 76.1, the definition statute and ordinance pertaining to Ohio Revised Code section 2907 and Tallmadge Ordinance sections 76.1 through 76.13, it appears that there are basic differences in the City ordinance and the State statute. The Court recognizes that although they may be different in form, they do not necessarily have to be distinguishable in substance. Researching the United States Supreme Court cases relating to this subject and taking into consideration the briefs of the parties in this case, the Court finds that there are three dominant or prevailing cases applicable to this subject decided by the United States Supreme Court.

Roth vs. United States 354 U.S. 476 (1957). The Court in this case sustained

a conviction under a federal statute punishing the mailing of obscene, lewd, lascivious, or filthy material. The Court in that case set certain guidelines as to what they felt constituted obscene material. However, the gravamen to that premis was the Court's rejection to the claim that obscene materials were protected by the First Amendment. The Court stated "All ideas having even the slightest redeeming social importance - unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion - have full protection of the First Amendment guarantees, unless excludable because they encroach upon the limited area of more important interests." <u>But inlicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance</u>. (emphasis added). They

went on to say "There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene- . . . It has been well observed that such utterances are not essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (emphasis added)

Some nine years later in Memoirs vs. Mass. 383 U.S. 413 (1966), the Court veered sharply away from the Ross concept and in that case articulated a new test of obscenity: (a) the dominant theme of the material taken as a whole appeals to the prurient interest in sex, (b) the material is

patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters, (c) the material is utterly without redeeming social value.

In the Roth case it was presumed that obscenity was utterly without redeeming social value; however, in Memoirs they required that to prove obscenity it must be affirmly established that the material is "utterly without redeeming social value."

In Miller vs. Calif. 413 U.S. 15 (1973), the Court stated that they do not adopt the constitutional standards "utterly without redeeming social value" a test of the Memoirs vs. Mass., supra. The burden to prove this would be virtually impossible to discharge under our criminal standards of proof.

It was stated in the Miller case that the standards and guidelines set down were for the benefit of the trier of facts. (emphasis added). They said "We emphasize that it is not our function to propose regulatory schemes for the states. They must await their concrete legislative efforts."

The Miller Court set out revised basic guidelines to be used conjunctively in determining what is obscene material:

(A) Whether the average person applying contemporary community standards would find the work to be taken as a whole, appeals to the prurient interest (that is, it must be material which from a reading or viewing thereof one arrives clearly at the conclusion that the author or designer had one purpose, namely, to sell his material by such an appeal).

(B) Whether the work depicts or describes in a patently offensive way,

sexual conduct specifically defined by the applicable state law, and

(C) Whether the work taken as a whole lacks serious literary, artistic, political or scientific value.

This Court, as I am sure any Court, feels that any statute or ordinance that may infringe on protected expression must be very closely scrutenized; however, this Court also feels that as enumerated in Roth and Miller, it has been categorically settled that obscene material is unprotected by the First Amendment. Taking this into consideration, the states and municipalities have a right to enact legislation prohibiting the sale or disseminating of obscene material. However, these statutes and ordinances must not be vague or over broad in their interpretation. As stated by the Supreme Court in Grayneal vs. City or Rockford, 408 U.S. 104 (1972)

"It's a basic principal of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." The Court stated in Erznoznikv vs. Jacksonville, 422 U.S. 205 (1975) "This Court has long recognized that a demonstrably over broad statute or ordinance may deter the ligitimate exercise of First Amendment rights. None the less, when considering a facial challenge, it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program. In accommodating these competing interests, the Court has held that a state statute should not be deemed facely invalid unless it is not readily subject to a narrowing construction by the state courts. . . and as a deterrent effect on ligitimate expression is both real and substantial."

Taking into consideration the briefs filed by the attorneys, the Supreme Court cases relating to this subject matter, the Ohio Revised Code section 2907 which was effective on January 1, 1974. (A committee comment after Ohio Revised Code section 2907.01 stated "The definition of obscenity is designed to meet the requirements of Roth vs. United States 354 U.S. 476 (1957) and cases following in its wake. It spells out what is "obscene" in much greater detail than existing case law, in order to increase the utility of the definition for law enforcement purposes." The Tallmadge Ordinances, 76.1 through 76.13 (which became effective on October 13, 1977, after the enactment of the Miller vs. California case). The Court finds that the obscenity ordinances of the City of Tallmadge differ both in form and substance from

the corresponding statutes of the State of Ohio. It would appear that the Tallmadge Ordinance follows the guidelines set down in Miller vs. California, supra.

The Court further finds that the ordinance is not vague although it might require a lay person to avail himself of a Webster's Dictionary or a Law Dictionary in order to fully understand some of the terminology used in the ordinances. The Court is further of the opinion that the ordinance is not overly broad that, in fact, it very pointedly and specifically sets out what is prohibited. The ordinance bears a substantial relation to the promotion of health, safety, morals and welfare of the citizens of that community; that the ordinance is not arbitrary and unreasonable and that it does have a substantial relation to the public

health, safety, morals or general welfare of that municipality.

Therefore, taking the foregoing into consideration, the Court hereby overrules the motion of the Defendant requesting the Court to dismiss the Complaint and finds that the ordinance is constitutional.

cc: Carmen V. Roberto, Attorney for Plaintiff
Howard Allison, Attorney for Defendant
File

No. 81-3202

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LOIS CHAPMAN,

Petitioner-Appellant

v. O R D E R

ANTHONY J. CARDARELLI, Sheriff of Summit County, Ohio; WILLIAM PIKE, Judge Municipal Court, Cuyahoga Falls, Ohio,

Respondents-Appellees

Before: KENNEDY and MARTIN, Circuit Judges; and CECIL, Senior Circuit Judge.

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above-styled case; and

No judge in active service in this court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the court's order;

Now, therefore, the motion for rehearing is hereby denied.

ENTERED BY ORDER
OF THE COURT

/s/ John P. Hehman
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 81-3202

LOIS CHAPMAN,

Petitioner-Appellant,

v.

ANTHONY J. CARDARELLI,
SHERIFF OF SUMMIT COUNTY, OHIO;
WILLIAM PIKE, JUDGE MUNICIPAL
COURT CUYAHOGA FALLS, OHIO:
WILLIAM J. BROWN, ATTORNEY GENERAL
STATE OF OHIO,

Respondent-Appellee

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the ceritficate of the Clerk

of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER
OF THE COURT

/s/ John P. Hehman
John P. Hehman, Clerk

FORM FOR USE IN APPLICATIONS

FOR HABEAS CORPUS UNDER 28 U.S.C. §2254

LOIS CHAPMAN
Name

Not applicable
Prison Number

Confinement to commence at 10 a.m.,

June 13, 1980 in the Summit County Jail
Place of Confinement

United States District Court for the

Northern District of Ohio, Eastern

Division

Case No.
(To be supplied by Clerk of U.S. District Court)

LOIS CHAPMAN, PETITIONER
(Full name) (Include name under which you were convicted)

v.

Anthony Cardarelli, Sheriff of Summit County, The Municipal Court of Cuyahoga Falls and The Honorable William B. Pike, RESPONDENT
(Name of Warden, Superintendent, Jailor, or authorized person having custody of petitioner)

and

THE ATTORNEY GENERAL OF THE STATE OF

Ohio, William J. Brown, ADDITIONAL RESPONDENT.

(If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. §2255, in the federal court which entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

INSTRUCTIONS--READ CAREFULLY

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and subscribed to under penalty of perjury as being true and correct. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form. Where more room is needed to answer any question use reverse side of sheet.

(2) Additional pages are not permitted. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5.00 your petition will be filed if it is in proper order.

(4) If you do not have the necessary filing fee, you may request permission to proceed in forma pauperis, in which event you must execute the affidavit on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds $_____, you must pay the filing fee as required by the rule of the district court.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment or conviction.

(7) When the petition is fully completed, the original and two copies must be mailed to the Clerk of the United States District Court whose address is _____
_____.

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

1. Name and location of court which entered the judgment of conviction under attack Municipal Court of Cuyahoga Falls, Summit County, Ohio

2. Date of judgment of conviction November 30, 1978

3. Length of sentence 30 days in the Summit Cty. Jail, $2,000.00
Sentencing judge William B. Pike

4. Nature of offense or offenses for which you were convicted: Pandering Obscenity; Tallmadge City Code of Ordinances, §76.11

5. What was your plea? (Check one)
(a) Not guilty (x)
(b) Guilty ( )
(c) Nolo Contendere ( )
If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. Kind of trial: (Check one)
(a) Jury (x)
(b) Judge only ( )

7. Did you testify at the trial?
Yes (x) No( )

8. Did you appeal from the judgment of conviction? Yes(x) No ( )

9. If you did appeal, answer the following:
(a) Name of court Court of Appeals of Ohio, 9th District, Summit County
(b) Result The conviction was affirmed
(c) Date of result July 18, 1979
If you filed a second appeal or filed a petition for certiorari in the Supreme Court, give details:
I appealed to the Supreme Court of Ohio. The Ohio Supreme Court dismissed for want of substantial constitutional question. Subsequently, I submitted a petition for writ of certiorari in the Supreme Court of the United States (79-1450) which was denied on May 12, 1980.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal: Yes ( ) No (x)

11. If your answer to 10 was "yes", give the following information:
(a)(1) Name of court _____
(2) Nature of proceeding _____
_____
(3) Grounds raised _____
_____
_____
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ( ) No ( )
(5) Result _____
(6) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of court_____

(2) Nature of proceeding_____

_____

(3) Grounds raised_____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ( ) No ( )

(5) Result_____

(6) Date of result_____

(c) As to any third petition, application or motion, give the same information:

(1) Name of court_____

(2) Nature of proceeding_____

_____

(3) Grounds raised_____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ( ) No ( )

(5) Result_____

(6) Date of result_____

(d) Did you appeal to the highest state court having jurisdiction the result of any action taken on any petition, application or motion:

(1) First petition, etc. Yes ( )
No ( )

(2) Second petition, etc. Yes ( )
No ( )

(3) Third petition, etc. Yes ( )
No ( )

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:_____

_____

_____

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. As to all grounds on which you have previously exhausted state court remedies, you should set them forth in this petition if you wish to seek federal relief. If you fail to set forth all such grounds in this petition, you may be barred from presenting them at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted all your state court remedies

with respect to them. However, you should raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you select one or more of these grounds for relief, you must allege facts in support of the ground or grounds which you choose. Do not check any of the grounds listed below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by a plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].
(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: The ordinances under which I was charged and convicted are unconstitutional under the first and fourteenth amendments, in that they are unconstitutionally vague and overbroad.

Supporting FACTS (tell your story briefly without citing cases or law): I was charged and convicted of pandering obscenity under Tallmadge City Code of Ordinances, §76.11. The definition of obscenity in force in Tallmadge and applicable to prosecutions under Tallmadge City Ordinance §76.11 is set forth in Tallmadge City Ordinance §76.1. The definition of obscenity in Tallmadge is unconstitutionally vague and overbroad in violation of the first and fourteenth amendments. The prohibitions contained in the ordinance against the depiction of nudity (defined in such a way as to embrace semi-

nudity), violence, cruelty, brutality and even the mere touching by one person of the thigh of another directly conflict with the Supreme Court's holding in Miller v. California, 413 U.S. 15 (1973). I was, therefore, convicted and sentenced under an unconstitutional framework of ordinances.

B. Ground two: The prosecution failed to meet its burden of proof by neglecting to present any expert testimony which was required to prove an essential element of the crime.

Supporting FACTS (tell your story briefly without citing cases or law): The City failed to sustain its burden of proof that the materials, which were the subject of prosecution, appealed to the prurient interest of the deviant groups to whom the materials were clearly directed. Because the prosecution failed to present any expert witness testimony concerning the prurient appeal of materials to deviant sexual groups, the prosecution failed to prove one of

the essential elements of the crime of pandering obscenity. Thus, I was denied Due Process of Law as guaranteed by the fourteenth amendment by being convicted without proof beyond a reasonable doubt of every element of the crime of pandering obscenity.

C. Ground three: _____

Supporting FACTS (tell your story briefly without citing cases or law): _____

D. Ground four: _____

Supporting FACTS (tell your story briefly without citing cases or law): _____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them: _____

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ( ) No ( )

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
(a) At preliminary hearing _____
Not applicable
(b) At arraignment and plea _____
Allison and Miller, 123 North Water Street, Kent, Ohio
(c) At trial Allison and Miller by Howard M. Allison, 123 North Water Street, Kent, Ohio
(d) At sentencing Allison and Miller by Howard M. Allison, 123 North Water Street, Kent, Ohio
(e) On appeal Allison and Miller by Howard M. Allison, 123 North Water Street, Kent, Ohio; Berkman, Gordon, Levy, Murray and Palda, 2121 Illuminating Bldg., Cleveland, Ohio
(f) In any post-conviction proceeding_____
_____
(g) On appeal from any adverse ruling in a post-conviction proceeding:_____
_____

16. Were you sentenced on more than one count of an indictment, or on more than one complaint, in the same court and at the same time?
Yes (x) No ( )

17. Do you have future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes ( ) No (x)
(a) If so, give name and location of court which imposed sentence to be served in the future:____
_____

(b) And give date and length of sentence to be served in future:

_____

_____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ( ) No ( )

Wherefore, petitioner prays that the court grant petitioner relief to which he may be entitled in this petition.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 12, 1980
(Date)

_____
(Signature)

/s/Bernard A. Berkman
Signature of Attorney
(if any)

THE MUNICIPAL COURT OF
CUYAHOGA FALLS

CUYAHOGA FALLS,
SUMMIT County, Ohio

THE STATE OF OHIO

| | | |
|---|---|---|
| CITY OF TALLMADGE | ) | No. 78 CRB 1144 |
| vs | ) | |
| | ) | SUMMONS UPON |
| LOIS CHAPMAN | ) | COMPLAINT |
| Name | ) | (Rules 4 and 9) |
| | ) | |
| 1463 Beardsley St., | ) | COPY TO SERVE |
| Akron, Ohio | ) | |
| Address | ) | |

FORM VI

TO LOIS CHAPMAN
(defendant)

A complaint, a copy of which is attached hereto, has been filed in the above captioned Court charging that you: did with knowledge of the character of the material
(describe the offense and state the numerical designation of the applicable statute or ordinance)
involved, exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display obscene material.

You are hereby summoned and ordered to appear at 9:30 o'clock A .M., on Monday, July 17th , 19 78 , in this
(day) (month) (date)
Court.

If you fail to appear at the time and place stated above you may be arrested.

/s/Elizabeth Ianty
Judge-Officer Designated by Judge(s)-Clerk-Deputy Clerk-Municipal Court

NOTICE TO DEFENDANT: For information regarding your duty to appear call 923-5291 The address of the Court is: 2310 SECOND STREET, CUYAHOGA FALLS, OHIO

_____

_____

CLERK'S INSTRUCTIONS TO SERVING OFFICER
FOR PERSONAL RESIDENCE, OR
CERTIFIED MAIL SERVICE

TO _____
(officer other than clerk authorized to serve summons)(clerk if service by certified mail)

Make[1] certified mail service upon

_____ at[2] the address
(defendant)
stated in the caption of the summons

_____
(fill in address for service if
different from caption of summons)

_____
Special instructions for server:

1.Personal, residence,
certified mail
2.Delete if different
address used

_____
Clerk-Deputy Clerk

THE MUNICIPAL COURT

CUYAHOGA FALLS, SUMMIT COUNTY, OHIO

THE STATE OF OHIO

CITY OF TALLMADGE )
vs )
)
LOIS CHAPMAN )
Name )
)
1463 Beardsley )
Street, Akron, Ohio)
Address )

COPY TO SERVE

No. 78 CRB 1144

COMPLAINT
BY INDIVIDUAL
(Rule 4)

**********

FORM I

Complainant being duly sworn states that LOIS CHAPMAN (defendant) The Avenue Bookstore at 294 West Ave., Tallmadge, Oh Summit County, Ohio on or about June 15 19 78, did with knowledge of the (state the essential facts) character of the material involved, exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display obscene material, contrary to and

in violation of Section 76.11(A)(2) of

the Tallmadge City Code
(state the numerical designation of the applicable statute or ordinance)

/s/John R. Morgan
MAYOR TALLMADGE
Complainant

Sworn to and subscribed before me

by John Morgan, Mayor of the City of

Tallmadge on July 7 , 19 78 .

/s/Elizabeth Ianty
Judge-Clerk-Deputy
Clerk-Municipal Court

or

Notary Public

County/State
of Ohio/

My Commission expires

, 19

THE MUNICIPAL COURT OF
CUYAHOGA FALLS

CUYAHOGA FALLS, SUMMIT
County, Ohio

THE STATE OF OHIO

| | | |
|---|---|---|
| CITY OF TALLMADGE | ) | No. 78 CRB 1145 |
| vs | ) | |
| | ) | SUMMONS UPON |
| LOIS CHAPMAN | ) | COMPLAINT |
| Name | ) | (Rules 4 and 9) |
| | ) | |
| 1463 Beardsley St., | ) | COPY TO SERVE |
| | ) | |
| Akron, Ohio | ) | |
| Address | | |

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FORM VI

TO LOIS CHAPMAN
(defendant)

A complaint, a copy of which is attached hereto, has been filed in the above captioned Court charging that you: did with knowledge of the character of the material involved,
(describe the offense and state the numerical designation of the applicable statute or ordinance)

(COUNT I) exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display obscene material, and (COUNT 2) possessed or controlled obscene

material with purpose to violate division (A)(2) of section 76.11 (Tallmadge City Code)

You are hereby summoned and ordered to appear at 9:30 o'clock A .M., on Monday, July 17th, 19 78, in this Court.
(day) (month) (date)

If you fail to appear at the time and place stated above you may be arrested.

/s/Elizabeth Ianty
Judge-Officer
Designated by Judge(s)
-Clerk-Deputy Clerk-
Municipal Court

NOTICE TO DEFENDANT: For information regarding your duty to appear call 923-5291

The address of the Court is: 2310 SECOND STREET, CUYAHOGA FALLS, OHIO

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CLERK'S INSTRUCTIONS TO SERVING OFFICER
FOR PERSONAL RESIDENCE, OR
CERTIFIED MAIL SERVICE

TO _____
(officer other than clerk authorized to serve summons)(clerk if service by certified mail)

Make[1] certified mail service

upon _____ at[2] the address
(defendant)
stated in the caption of the summons

_____
(fill in address for service if different from caption of summons)

_____
Special instructions for server:

1. Personal, residence, certified mail
2. Delete if different address used

_____
Clerk-Deputy Clerk

THE MUNICIPAL COURT

CUYAHOGA FALLS,
SUMMIT COUNTY, OHIO

| | |
|---|---|
| THE STATE OF OHIO | COPY TO SERVE |
| CITY OF TALLMADGE ) | No. 78 CRB 1145 |
| vs ) | |
| ) | |
| LOIS CHAPMAN ) | COMPLAINT |
| Name ) | BY INDIVIDUAL |
| ) | (Rule 4) |
| 1463 Beardsley St., ) | |
| ) | |
| AKRON, OHIO ) | |
| Address ) | |

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FORM I

Complainant being duly sworn states that LOIS CHAPMAN (defendant) at The Avenue Bookstore 924 West Ave., (place) Tallmadge Summit, County, Ohio on or about July 1, , 19 78, did with knowledge of the character of the material involved, (COUNT I) exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display obscene material, and (COUNT 2) possessed or controlled obscene material with purpose to violate (state the essential facts)

division (A)(2) of section 76.11;

contrary to and

in violation of section 76.11(A)(2)

and 76.11(A)(5) of the Tallmadge City

Code

(state the numerical designation of the applicable statute or ordinance)

/s/John R. Morgan

MAYOR TALLMADGE
Complainant

Sworn to and subscribed before me

by John Morgan, Mayor of the City of

Tallmadge on July 7, 19 78 .

/s/Elizabeth Ianty
Judge-Clerk-Deputy
Clerk-Municipal Court

or

Notary Public

County/State of Ohio/

My Commission expires _____,

19_____.

## FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

§2241. Power to Grant Writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisioner unless--

(1) He is in custody under or by color of the authority of the United

States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of the nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

§2253. Appeal

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

## §2254. State Custody; Remedies in Federal Courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstantces rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidence by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it

shall otherwise appear, or the respondent shall admit--

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record: And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination

has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph number (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduces in such State court proceeding to support the State court's determination of factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of

the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

Section 76.1 -- Definitions

[A] "Sexual Conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

[B] "Sexual Contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if such person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

[C] "Sexual Activity" means sexual conduct or sexual contact, or both.

***

[F] When considered as a whole, applying local community standards, and

judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to such group, any material or performance is "Obscene" if the following apply:

(1) Its dominant appeal is to prurient interest; and

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite; or

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality; or

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions or elimination in a way which

inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral or artistic purpose; and

(5) When taken as a whole, it lacks serious literary, artistic, political or scientific value.

[G] "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

[H] "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a descernibly turgid state.

Section 76.11 -- Pandering Obscenity

[A] No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material, when the offender knows that such material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when he is reckless in that regard;

(2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material;

(3) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;

(4) Advertise an obscene performance for presentation, or present or parti-

cipate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged;

(5) Possess or control any obscene material with purpose to violate division [A], (2) or (4) of this section.

(6) Exhibit obscene material by movie, film or other commercial manner which may be observed by persons, whether minor or adult, who have not by their own choosing entered an enclosed building wherein the same are depicted.

The exhibition of any such obscene material upon any location not completely within an enclosed building shall be prima facie evidence of the violation of this section.

[B] It is an affirmative defense to a charge under this section, that the material or performance involved was disseminated or presented for a bona

fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.

[C] This section shall not apply if the offender has previously been convicted of a violation of this section or of section 76.10 of the Tallmadge City Code of Ordinances, or a violation of Section 2907.31 or 2907.32 of the Ohio Revised Code.

[D] Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree.

## IN GENERAL

§2907.01 Definitions. As used in sections 2907.01 to 2907.37 of the Revised Code:

(A) "Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if such person is a female, a breast, for the prupose of sexually arousing or gratifying either person.

(C) "Sexual activity" means sexual conduct or sexual contact, or both.

(D) "Prostitute" means a male or female who promiscuously engages in

sexual activity for hire, regardless of whether the hire is paid to the prostitute or to another.

(E) Any material or performance is "harmful to juveniles," if it is offensive to prevailing standards in the adult community with respect to what is suitable for juveniles, and if any of the following apply:

(1) It tends to appeal to the prurient interest of juveniles;

(2) It contains a display, description, or representation of sexual activity, masturbation, sexual excitement, or nudity;

(3) It contains a display, description, or representation of bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a display, description, or representation of human

bodily functions of elimination;

(5) It makes repeated use of foul language;

(6) It contains a display, description, or representation in lurid detail of the violent physical torture, dismemberment, destruction, or death of a human being;

(7) It contains a display, description, or representation of criminal activity which tends to glorify or glamorize such activity, and which with respect to juveniles has a dominant tendency to corrupt.

(F) When considered as a whole, and judged with reference to ordinary adults, or, if it is designed for sexual deviates or other deviates or other specially susceptible group, judged with reference to such group, any material or performance is "obscene" if any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity,

masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion

thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(I) "Juvenile" means an unmarried person under the age of eighteen.

(J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record or tape, or other tangible thing capable of arousing interest through sight, sound, or touch.

(K) "Performance" menas any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.

§2907.32 Pandering Obscenity.

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material, when the offender knows that such material is to be used for commercial exploitation or will be publicly disseminated or displayed, or when he is reckless in that regard;

(2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material;

(3) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;

(4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged;

(5) Possess or control any obscene material with purpose to violate division (A)(2) and (4) of this section.

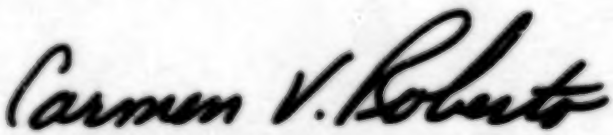
(B) It is an affirmative defense to a charge under this section, that the material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.

(C) Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree. If the offender has previously been convicted of a violation of this section or of section 2907.31 of the Revised Code, then pandering obscenity is a felony of the fourth degree.

Now comes Respondent, The Honorable William Pike, pursuant to Rule 22 of the Rules of the Supreme Court of the United States and hereby waives his right to file a Brief in Opposition to Petitioner Lois Chapman's Petition for a Writ of Certiorari. Respondent wishes to rely on the Answer it filed in Case No. 79-1450, **Lois Chapman v. City of Tallmadge,** the criminal prosecution from which this habeas corpus case arose and which this Honorable Court refused to accept jurisiction of. Attached as Appendix A is a copy of that Answer.

**PROOF OF SERVICE**

I hereby certify that a true copy of the foregoing **Respondent the Honorable William Pike's Answer to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit** was sent by regular U. S. mail to George Palda, 2121 the Illuminating Building, 55 Public Square, Cleveland, Ohio 44113, Attorney for Petitioner on this 13th day of August, 1982.



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IN THE

# Supreme Court of the United States

OCTOBER TERM 1979

Case No. 79-1450

LOIS CHAPMAN

Petitioner,

-v.-

CITY OF TALLMADGE,

Respondent.

## RESPONDENT'S ANSWER TO PETITION FOR A WRIT OF CERTIORARI FROM THE SUPREME COURT OF OHIO


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## STATEMENT OF THE CASE

Petitioner was charged in two separate Complaints with three counts of Pandering Obscenity. In case No. 78 CRB 1144 (Cuyahoga Falls Municipal Court Case Number) she was charged with selling the magazine **Peek Show** (City's Exhibit A) to Tallmadge Detective Thomas Walters on June 15, 1978 in violation of Section 76.11 (A) (2) of the Tallmadge City Code, a misdemeanor of the first degree. In Case No. 78 CRB 1145 (Cuyahoga Falls Municipal Court Case Number) she was charged with two counts of Pandering Obscenity. Count One charged that on July 1, 1978 Petitioner sold the magazine **Wet Dreams** (City's Exhibit B) to Detective Walters in violation of Section 76.11 (A) (2) of the Tallmadge City Code. Count Two charged her with the possession or control of the newspaper **Smut** (City's Exhibit C) and the magazine **Hung Cadets** (City's Exhibit D) with a purpose to violate Section 76.11 (A) (2) of the Tallmadge City Code in violation of Section 76.11 (A) (5) of the Tallmadge City Code. Numerous pleadings were filed below and extensive Discovery accomplished. Petitioner was afforded a detailed Bill of Particulars. Two Motions to Dismiss were filed by her, briefed and overruled. Respondent moved for and was denied a View of the Premises where the crime occurred. Petitioner filed a Motion For A Pre-Trial Order requesting the trial court to define the community to be used in designating the admissibility of evidence of contemporary community standards. The court granted this request and informed the parties that the appropriate community would consist of the Court's territorial jurisdiction.

At Trial the City's case against Petitioner consisted solely of the testimony of Detective Walters of the Tallmadge Police Department and the City's Exhibits. The testimony encompassed a detailed description of the premises known as the Avenue Bookstore (the locale of the crime) and the identification of three magazines and one newspaper purchased by the detective there. The officer's testimony revealed that the bookstore is a business location (TR. p.3) in a Tallmadge shopping center. The bookstore is divided into two sections. One offers for sale city and national newspapers (TR. p.6), paperback novels (TR. p.7), adult magazines of the Playboy variety (TR. p.7), magazines of the Life variety (TR. p. 7), candy (TR. p.7), and birthday and other cards (TR. p.7). The other section offers for sale 8mm movies (TR. p.9), Doc Johnson love products (TR. p.9), dildoes and vibrators (TR. p.10), soap in the shape of vaginas and penises (TR. p.10), electronic massage units (TR. p.10), inflatable dolls (TR. p.10), a large variety of sexually oriented magazines specifically placed by the nature of their content (i. e., couples, lesbian, heterosexual, new releases, homosexual, etc. (TR. p.10,11), vulgar greeting cards (TR. p.12), and paperbacks (TR. p.12).

There is also a cashier's counter from which the person standing behind it can view the entire store (TR. p.8). This counter also contained for sale roach clips, smoking pipes and paraphanalia (TR. p.8). Separating the two portions of the store is a swinging door variously labelled, including "No One Under 21 Permitted To Enter", "Browsing—15 Minutes Only", no refunds, Visa and Master Charge (TR. p.8). The Detective saw Petitioner in

the store on various occasions (TR. p.8) and he testified that she was behind the cashier's counter and had sold him City's Exhibits A, B, C and D as well as numerous items not introduced in evidence (TR. p.14, 15, 16). On a prior occasion Petitioner told the detective that she was the Manager of the bookstore (TR. p.14). The detective identified City's Exhibits A, B, C and D (TR. p. 16, 18, 19) and they were offered into evidence (TR. p.25). The City rested its case. Defense counsel's Motion for Judgment of Acquittal was overruled by the trial court (TR. p.86). At that time Petitioner claimed solely that **Peek Show** (City's Exhibit A) would only appeal to a bizarre or deviant sex group (TR. p.65). Her Petition has enlarged that claim to now include all the City's Exhibits. The Motion was overruled. Petitioner then proceeded to call two professors, a photographer and the Defendant in her case. Prof. Pesky's testimony was basically to the effect that items similar to the City Exhibits are available throughout the Court's jurisdiction and that a plethora of such materials which were intorudced into evidence by the Defendant were, in fact, similar thereto (TR. p.102). He also testified that there is no relation between pornography and crime (TR. p.109) and that the City's Exhibits and the Defendant's exhibits do not affront contemporary community standards (TR. p.112). These matters were testified to in his capacity as an expert. He also testified that City's Exhibit C (Smut) would stimulate the deviant group for which he thought it was intended (TR. p. 127). Katherine Broda testified that she accompanied Defense Attorney Allison to various bookstores and that the Defendant's evidentiary magazines and paperbacks were purchased in the Court's jurisdiction

and were similar to the City's Exhibits (TR. p. 151), which similarity the City stipulated to at the trial. She also identified various photographs she took showing those locations, both exterior and interior (TR. p. 148). Petitioner testified that she was the Manager of the Avenue Bookstore (TR. p.167), that she worked for the New York Avenue News Corporation for twelve years (TR. p.167), that she went to work to support her family (TR. p.168), that she went through the tenth grade (TR. p.168), that people under 21 are not allowed in the back portion of the store (TR. p.169), that she never read the City's Exhibits (TR. p.169), and that she had no prior criminal record (TR. p.172). On cross-examination she testified that she was responsible for placing the items sold in the restricted area on the shelf after delivery (TR. p.180), that there was a scheme or plan or design to determine the placement of books in separate areas of the store (TR. p.181), that the cashier had a full view of the entire back area of the bookstore (TR. p.182), that adult greeting cards were separated from the other greeting cards for placement in the back of the store (TR. p.183), that she sold several items to Detective Walters (TR. p.184), that she has worked at two other bookstores of the same type as the Avenue Bookstore in Tallmadge (TR. p.187), that she felt it is sufficient to look at the books' covers to tell the nature of the material (TR. p.191), that she was summoned into Court and not arrested (TR. p.191), and that she was properly treated by the Police and Prosecutors during the prosecution (TR. p.192). On redirect examination Petitioner testified that the adult magazines are sealed so that only the covers may be seen (TR. p.193). On recross she stated that she

was familiar with the character of the material sold in the adult section of the bookstore (TR. p.195). Dr. Lewis' testimony was mainly to the effect that in his opinion the only way to determine contemporary standards as relates to obscenity would be by conducting a survey (TR. p.202). He also testified that there is no causal relationship between pornography and antisocial behavior, and that in actuality the converse is true (TR. p.214).

Another Motion for Judgment of Acquittal after the Defense rested was overruled. The defense Exhibits were introduced into evidence. Closing Arguments were made and the Appellant was convicted on all three counts contained in both Complaints.

The Ninth District Court of Appeals, Summit County, Ohio upheld the three convictions on July 18, 1979.

The Ohio Supreme Court dismissed her appeal for lack of a substantial constitutional question on October 19, 1979. From that denial Petitioner seeks a Writ of Certiorari from this honorable Court.

## RESPONDENT'S REASON FOR DENYING THE WRIT

EXPERT TESTIMONY WAS NOT REQUIRED IN THIS STATE CRIMINAL PROSECUTION FOR PANDERING OBSCENITY TO PROVE APPEAL TO THE PRURIENT INTEREST OF A DEVIANT GROUP.

While the issue presented by Petitioner is admittedly unique it is Respondent's position that it is not of such constitutional significance to warrant the exercise of this Court's discretion by granting a writ of certiorari. The Courts below have decided the issue in accordance with the applicable decisions of this Court and there are no special or important considerations justifying a review of those determinations.

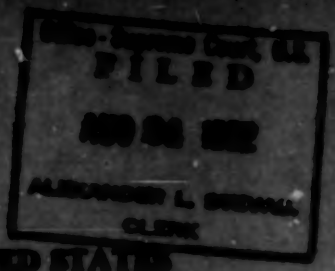
Petitioner has argued throughout her Appeals that all four of the City's Exhibits introduced at her trial were meant to appeal to a bizarre or deviant sex group. Respondent has challenged the correctness of that argument in each Appellate Court. After the City rested its case her Motion for Judgment of Acquittal involved only one of the four magazines (Exhibit A, Peek Show). Exhibit C, **Smut**, deals with various types of sex, including, in part, sado-masochism. **Wet Dreams** (Exhibit B) deals somewhat with fetishes but is also directed at various other sexual groupings. **Hung Cadets** (Exhibit D) is targeted at homosexuals, as was Exhibit A. After Petitioner rested her case she then raised the deviancy argument as to all four Exhibits. One of her own experts testified that the materials would appeal to a deviant group. Exactly what is a "deviant group" has never been fully addressed but Respondent respectfully suggests that the Exhibits introduced in this particular prosecution do

not squarely fall within this category. The correctness of Petitioner's underlying hypothesis (that the City's Exhibits are directed at a bizarre or deviant group) being in error the rest of her arguments do not square logically.

Assuming, arguendo, that the materials were directed solely to homosexuals, fetishists, lesbians, and sado-masochists are all those categories the type of "bizarre deviant group" this Court spoke of in Paris Adult Theatre I, et al., v. Slaton, et al., 413 U. S. 49 (1973)? Respondent contends that homosexuals and lesbians are not within that category.

The use of expert witnesses, as this Court stated in the Paris, supra, decision, has often made a mockery of the concept of expert testimony. Respondent's opinion is that Petitioner's trial provides a poignant example of such a mockery, one of the Defense experts being unable to determine if the dominant theme of the City's Exhibits was that of sex in various forms (TR. p.120). Petitioner produced two experts in her behalf and the record reflects that her counsel forcefully argued to the jury that the City's case was lacking experts which were needed to testify concerning the materials. Both the expert testimony and closing argument were unpersuasive to the jury. The credibility of witnesses being within the province of the jury of what utility would it have been to require an expert to testify whom the jury would be free to ignore, as it ignored Petitioner's experts?

It has often been held by this Court that experts are not normally needed in an obscenity prosecution. See Jacobellis v. Ohio, 378 U. S. 184 (1964); Ginzburg v. U. S., 383 U. S. 463 (1966); U. S. v. Wild, 422 F. 2d 34 (1970), cert. den'd, 402 U. S. 988 (1971); Kaplan v.




IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CASE NO. 92-87

LOIS CHAPMAN,

Petitioner,

-vs-

ANTHONY CARDARELLI, et al.,

Respondents.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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# RESPONDENT THE HONORABLE WILLIAM PIKE'S ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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California, 413 U. S. 115 (1973); Hamling v. U. S., 418 U. S. 87 (1974). The above decisions have held that the obscene materials speak for themselves.

The following language from the Paris, supra, decision, found in Footnote 6, is that upon which Petitioner relies in her quest for a writ:

> We reserve judgment, however, on the extreme case, not presented here, where contested materials are directed at such a bizarre deviant group that the experience of the trier-of-fact would be plainly inadequate to judge whether the material appeals to the prurient interest.

This Court had occasion to amplify upon this footnote in the recent case of Pinkus, et al. v. U. S., 436 U. S. 293 (1978). This suit involved the mailing of obscene materials. The government's case in Chief consisted of the mailed materials and various factual stipulations. The defense consisted of expert testimony, surveys to demonstrate that the materials were not obscene, and comparable materials. On rebuttal the government called an expert to testify that the materials appealed to the prurient interest of the average person and to members of certain deviant groups. This court stated, on pages 301-302:

> Examination of some of the materials could lead to the reasonable conslusion that their prurient appeal would be more acute to persons of deviant persuasions, but it is equally clear they were intended to arouse the prurient interest of any reader or observer. . . Many of the exhibits depicted aherrant

> sexual activities. These depictions were generally provided along with or as a part of the materials which apparently were thought likely to appeal to the prurient interest in sex of nondeviant persons. . . Concededly, in the past we have "reserve (d) judgment . . . on the extreme case . . . where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the (particular) prurient interest." **Paris Adult Theatre I v. Slaton**, 413 U. S. 49, 56, n.6 (1973). But here we are not presented with that "extreme" case because the government did in fact present expert testimony on rebuttal which, when combined with the exhibits themselves, sufficiently guided the jury.

At Petitioner's trial one of her own experts sufficiently guided the jury in conjunction with the materials themselves. Her other expert could not testify as to whether or not the materials would appeal to deviants. The Petitioner's photographer testified that the materials were art and did not appeal to her. Though not exactly on point with **Pinkus, supra**, this matter is close enough to apply its logic, especially in light of the commercial exploitation here involved and the logical inferences that may properly be drawn from the act of pandering when considering the prurient appeal of the materials. See **Ginzburg v. U. S., supra**. Respondent suggests that the mode of the sale of the items is the best evidence of its intended appeal. In view of the manner in which the

bookstore was divided into a general goods section and an adult, over 21 section the lower courts were correct in allowing the convictions to stand. Defendants are free to bring in whatever relevant experts they desire, as Petitioner did, for whatever probative value they can convince a court or jury to attach to their testimony.

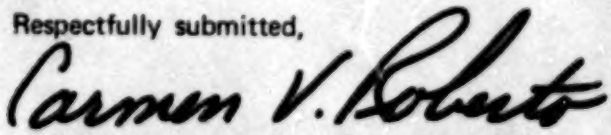
**Ward v. Illinois**, 431 U. S. 767 (1977) involved the sale of two obscene publications titled **Bizarre World** and **Illustrated Case Histories, a Study of Sado-Masochism.** The State's evidence consisted solely of the publications and the testimony of the purchasing police officer. Without specifically mentioning the deviancy issue this Court upheld the conviction.

This is not an extreme case falling within the category for which judgment was reserved.

## CONCLUSION

The Respondent respectfully requests this Court to deny Petitioner's Writ of Certiorari.

Respectfully submitted,



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## PROOF OF SERVICE

I hereby certify that three copies of the foregoing Respondent's Answer to Petition for a Writ of Certiorari was sent by regular U. S. mail to Bernard A. Berkman, 2121 The Illuminating Building, 55 Public Square, Cleveland, Ohio 44113 this _____ day of April, 1980.

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